88-464

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY,
FRVR CORPORATION, and the
INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILLIAM G. MAHONEY
JOHN O'B. CLARKE, JR.*
HIGHSAW & MAHONEY, P.C.
Suite 210
1050 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500
Attorneys for Petitioners Railway Labor Executives' Association, et al.
* Counsel of Record

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QUESTIONS PRESENTED *

1. Do the United States District Courts have jurisdiction to determine what working conditions constitute the status quo when those courts are called upon to enforce the command of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, that a carrier maintain unchanged those working conditions out of which a dispute arose where the carrier asserts that it has a contractual right to change those actual, objective working conditions?

2. Do the United States District Courts, in enforcing Section 2 Seventh of the Railway Labor Act, 45 U.S.C. § 152 Seventh, and Section 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108, have jurisdiction to examine the merits of a rail carrier's reliance on collective bargaining agreements and past practice in defending against a claim that it has unilaterally changed working conditions as embodied in agreements by selling a rail line without first bargaining over the impact of that sale on employees?

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* Petitioners in this case include the Railway Labor Executives' Association and fourteen labor organizations; those individual labor organizations are listed on Appendix E attached hereto at 50a and are marked by asterisks on that Appendix. Another organization, the International Association of Bridge, Structural and Ornamental Ironworkers was an appellant when this case was in the court of appeals, but is no longer involved in this case since none of its members will be affected by this sale. Petitioners maintain that that organization, which is not an RLEA member organization, no longer has an interest in the outcome of this petition.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Railway Labor Executives' Association [hereinafter, "RLEA"] [1] and the fourteen (14) individual labor organizations [2] which are also petitioners herein, respectfully request that this Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the decision of that Court which was entered on August 23, 1988, in *Chicago &*

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[1] RLEA is an unincorporated association of the Chief Executive officers of nineteen (19) labor organizations which collectively represent virtually all organized rail employees in this Country. RLEA's member organizations are listed on Appendix E at page 50a.

[2] *See*, note * at page i.

North Western Transportation Co. v. RLEA, 7th Cir. No. 88-1504.

OPINIONS BELOW

Although the decision of the court of appeals is not yet officially reported, it is reproduced herein as Appendix A at pages 1a-22a. The judgment of the court of appeals, which was entered on August 23, 1988, is reproduced herein as Appendix C at pages 33a-34a. The district court did not issue a written opinion, but rendered its ruling orally on March 16, 1988; that oral ruling is reproduced herein as Appendix B at pages 24a-32a.

JURISDICTION

The court of appeals entered its ruling on August 23, 1988, affirming the grant of a preliminary injunction by the district court; petitioners have not sought rehearing. This petition is timely since it was filed within the ninety (90) day time period established by 28 U.S.C. § 2101(c). Petitioners are seeking to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the interpretation of Sections 2 First, 2 Seventh, 3 and 6 of the Railway Labor Act (45 U.S.C. §§ 152 First, 152 Seventh, 153 and 156) and Section 8 of the Norris-LaGuardia Act (29 U.S.C. § 108). Specifically, the questions presented center around whether the federal courts have jurisdiction to enforce the notice, bargaining and status quo commands of the Railway Labor Act, when a rail carrier asserts that its actions are authorized by various collective bargaining agreements. The above statutory provisions, as well as Section 2 of the Norris-LaGuardia Act, 29 U.S.C. § 102, which is involved in construing Section 8 of the anti-injunction Act, are reproduced herein as Appendix D at pages 35a-49a.

STATEMENT OF THE CASE

In early 1986, respondent Chicago & North Western Transportation Company [hereinafter, "C&NW"] operated approximately 7,000 miles of rail lines in the midwestern portion of the country and employed around 9,000 employees to perform those operations. *See*, Appendix A at 2a; Sup. Ct. No. 87-2049, Pet. at 3. That rail system is substantially smaller, both in mileage and in manpower, than the rail system which the C&NW had operated in the late 1960's, for during the past twenty (20) years respondent has reduced its rail system by abandonments,[3] and recently, its employment levels by furloughs.[4] Brief for C&NW in 7th Cir. No. 88-1504 at 2. Prior to 1986, that reduction in route miles was accomplished by abandonments of unprofitable rail lines under the procedures established in 49 U.S.C. §§ 10903 and 10904. RLEA Brief in 7th Cir. No. 88-1504 at 4. However, as the records both in this case and in No. 87-2049 show, respondent C&NW considered the abandonment process to be unsatisfactory to achieve its goal of adequate profitability, primarily because the abandonment process, which requires the approval of the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] under 49 U.S.C. § 10903, was time consuming, was frequently subjected to shipper and community objections, and required the C&NW to provide what it characterized as being "incredibly expensive and onerous" benefits to its employees who may be affected by the abandonments. Transcript of March 15, 1988 [hereinafter, "Tr."] at 4; 49 U.S.C. § 10903(b)(2). Whenever the C&NW reduced its mileage by abandonment prior to 1986, the ICC required it to provide all employees affected by the abandonments with monetary and other benefits over and

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[3] Respondent asserts that in "the past 20 years, C&NW has abandoned about 6,000 miles of track . . . ." Brief for C&NW in 7th Cir. No. 88-1504 at 2.

[4] Respondent asserts that it has "reduced its workforce by 41% since 1981 alone." Brief for C&NW in 7th Cir. No. 88-1504 at 2.

above the provisions set forth in its collective bargaining agreements with petitioners.

Responding to the ICC's relaxation of its policies concerning employee protections, respondent C&NW decided in 1985 to "embrace line sales to non-carrier operators [under 49 U.S.C. §§ 10505 and 10901] as a method for preserving marginal lines, recovering its capital assets, and simultaneously preserving an opportunity to participate in the traffic." Tr. at 7. Other favorable aspects of the line sale method for reducing its system were that line sales enabled respondent to dispose of marginally profitable (as contrasted with unprofitable) lines and to do so without being subject to ICC-imposed conditions to protect the interests of employees. *Compare, Durango & Silverton Narrow Gauge R.R.—Acquisition and Operation*, 363 I.C.C. 292 (1979), *with, Ex Parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901* [hereinafter, *"Ex Parte 392"*], 1 I.C.C.2d 810, 815 (1985), *aff'd sub nom. Illinois Commerce Comm. v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (table).

Respondent first implemented this new approach to reducing its system in 1986 when it sold 826 miles of its rail system, and transferred an additional 139 miles of track, to a newly-formed rail carrier, the Dakota, Minnesota & Eastern Railway Corporation, under the class exemption granted by the ICC in *Ex Parte 392*. Rail labor sought to bargain with the C&NW over the impact which that sale would have on approximately 170 employees who would be affected, but respondent C&NW asserted that the ICC's jurisdiction over that sale relieved it of any obligation towards its employees under the Railway Labor Act either to bargain over the impact of the sale on employees or to preserve the status quo pending that bargaining. Respondent's reliance on the ICC's jurisdiction to justify its refusal to bargain was sustained by the United States Court of Appeals for the

Eighth Circuit and has resulted in the petition which is presently pending before this Court in No. 87-2049.

While the Dakota, Minnesota & Eastern sale case was pending before the Eighth Circuit, respondent C&NW entered into an agreement with respondent FRVR Corporation to sell to that newly-formed subsidiary of Itel Rail Corporation[5] several shop facilities and approximately 208 miles of the C&NW between Green Bay and Milwaukee, Wisconsin [hereinafter, "Duck Creek South lines"]. Under that sale agreement, FRVR agreed to adopt "all existing rates, shipper agreements, transportation contracts and exempt quotations" (Verified Statement of L.F. Fox at 3), but it would not assume or become responsible for any C&NW collective bargaining agreement. Moreover, although respondent FRVR agreed to give a "right of first-hire" to C&NW employees who would be displaced by the sale, the new carrier has informed the C&NW employees that they will have to resign from the C&NW before they can become FRVR employees. Tr. at 104-05, 108.

Once rail labor learned of the possible sale of the Duck Creek South lines to respondent FRVR, the labor organizations began to serve notices on the C&NW under Section 6 of the Railway Labor Act, 45 U.S.C. § 156, to negotiate agreements to deal with the impact of that sale on the employees they represent.[6] These notices were

[5] Itel Rail Corporation directly or indirectly controls five other railroads, including one railroad which connects with the lines to be purchased from the C&NW. RLEA Brief in 7th Cir. No. 88-1504 at 8.

[6] When the C&NW asserted that the notices were barred by the moratorium provisions in the National Agreements which prohibited the service of Section 6 Notices on any subject closed by the National Agreements until April 1, 1988, petitioners served new Section 6 notices in February 1988 specifically tailored to this sale which had not been a subject of the national negotiations which lead to the National Agreements. Moreover, after the moratorium period expired on April 1, 1988, petitioners served

served because the sale would result in the elimination of around 300 jobs and the permanent loss of the job opportunities on the Duck Creek South lines. Moreover, rail labor asserted, the transfer of the work opportunities would change the seniority rights of employees whose seniority currently encompasses the Duck Creek South lines. For example, the yardmasters on the C&NW have a district form of seniority, as contrasted with system-wide seniority; this means that employees represented by the Railroad Yardmasters of America may use their seniority to bid for C&NW yardmaster positions in the territory covered by their seniority district, but not for yardmaster positions on other C&NW yardmaster seniority districts. Declaration of R.W. Olson. The Duck Creek South lines make up one yardmaster seniority district and the sale of those lines will eliminate that entire seniority district. *Id.* Also, the Duck Creek South lines are within the C&NW clerical employees' Seniority District No. 22, and the sale of those lines will eliminate approximately one-third of the jobs available to employees in that seniority district. Declaration of W.J. Van Kleek.

Rail labor proposed to deal with the impact of the sale on employees by negotiating agreements to provide both for the adjustment of the affected employees' seniority and for compensatory benefits to employees who may be placed in a worse position with respect to their compensation or working conditions as a result of that sale. *E.g.*, Short Appendix in 7th Cir. No. 88-1504 at Attachment F. Respondent C&NW responded to those notices by asserting that they were invalid for several reasons, including the C&NW's belief that the notices sought to usurp the authority of the ICC and concerned matters

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a third set of notices. Declaration of H.S. Gerth, dated August 30, 1988.

"reserved" to management's prerogatives.[7] Affidavit of R.J. Cuchna at 6-10. Respondent C&NW, however, stated that it was "agreeable to a meeting to discuss" rail labor's concerns. *Id.* at 6. Those discussions, though, were to be without prejudice to the C&NW's position that it did not have an obligation to bargain under the Railway Labor Act over the sale's impact on employees. Nevertheless, in early January 1988, respondent C&NW proposed to enter into an agreement offering a form of separation allowance to employees who may be affected by the sale and who were not able either to retain a position with the C&NW or to obtain employment with FRVR. Verified Statement of R. Schmiege at Appendix A, p.2; Supplemental Affidavit of R.J. Cuchna at § S-11. However, that proposal, respondent C&NW stated, was not to be considered as a Section 6 notice, was made without prejudice to its position that it had no obligation to bargain over the impact of the sale on employees, and would be made available to the employees even if rail labor did not enter into such an agreement. *Id.*

Rail labor and respondent C&NW met on several occasions to "discuss" rail labor's section 6 notices and respondent's proposal, but no agreement has been reached. *E.g.*, Gerth Declaration, *supra*, at 2. Those discussions are still being held. *Id.*

Shortly after several of the labor organizations served their first Section 6 notices on respondent C&NW, that carrier filed a complaint on January 19, 1988, with the United States District Court for the Northern District of Illinois seeking declaratory and injunctive relief. Respondent asked for a declaratory judgment declaring that the sale of the Duck Creek South lines, and matters per-

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[7] Respondent also asserted that the pre-April 1988 notices were barred by the Moratorium clauses in the National Agreements. *See*, note 6, *supra*. Although that objection was raised below, neither court ruled upon it, and in view of the April 1, 1988 deadline in the moratorium clauses, that objection is now moot.

taining to the protection of affected employees, were not proper subjects of bargaining because those matters were within the ICC's exclusive jurisdiction over rail line sales and were within "the sphere of C&NW managerial discretion . . . ." C&NW Complaint at 7. Respondent C&NW also sought a declaratory judgment that "any strike in connection with the Duck Creek South line sale, or labor protections in connection with that sale, would violate the Interstate Commerce Act and the Railway Labor Act . . . ." *Id.* at 8.[8] Petitioners counterclaimed seeking to enforce the Railway Labor Act's notice, bargaining and status quo obligations, and answered the C&NW's complaint by challenging both the court's jurisdiction to issue a strike injunction and the C&NW's standing under Section 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108, to seek injunctive relief.[9]

In February 1988, respondent C&NW announced that it would sell the Duck Creek South lines in early March, and rail labor responded by threatening to strike if the sale occurred before an agreement was reached concerning the impact of the sale on employees. Respondents C&NW and FRVR then asked the district court to enjoin such a strike and on March 16, 1988, the district court granted respondents' request for a preliminary injunction because, the court concluded, petitioners were impermissibly threatening to strike over a "minor" dispute. Appendix B at 29a.

Respondent C&NW had asserted that the reduction in force provisions in its collective bargaining agreements with petitioners, which require the C&NW to give a cer-

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[8] Respondent also sought a declaration that the moratorium clauses barred the Section 6 notices.

[9] Respondents FRVR and ICC subsequently intervened in support of respondent C&NW.

tain number of days advance notice of job abolishments, *authorized* it to abolish the jobs when it sold the Duck Creek South lines. Consequently, the C&NW's argument continued, rail labor's challenge to its ability to sell and abolish jobs before agreements were reached presented nothing more than a dispute over its construction of its agreements and was, thus, subject to the exclusive jurisdiction of the adjustment boards established under Section 3 of the Railway Labor Act. Respondent further asserted that the past practice of abandoning lines and abolishing jobs without first bargaining under the Railway Labor Act supported its contention that this case actually involved a "minor dispute"—*i.e.*, a dispute within the exclusive jurisdiction of the adjustment boards. The district court accepted that argument because "the railroad's claims of contractual justification are not 'frivolous' or 'obviously insubstantial.'" Appendix B at 29a.[10]

Petitioners took an expedited appeal from the injunction order, but on August 23, 1988, the Seventh Circuit issued its decision affirming the grant of a strike injunction. According to the court of appeals, the collective bargaining agreements and the parties' past practices "embrace matters of job abolishment, layoff and reassignment . . . ." Appendix A at 14a. While the court noted that the C&NW's arguments that the "collective bargaining agreements contemplate abolishment of jobs without any of the severance-related benefits sought by the RLEA unions is based primarily, if not exclusively, on its claims as to the past practice or course of dealing under the

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[10] While the district court addressed the relationship between the Railway Labor Act and the Interstate Commerce Act, and the relationship of the Norris-LaGuardia Act to the Interstate Commerce Act, the validity of those rulings was not addressed by the court of appeals.

provisions of the agreements that pertain to job abolishment and layoff" (*id.*), that fact was not determinative because "nothing in the record" indicated that the past practice relied upon by the C&NW was "inconsistent with the express provisions of the agreements . . . ." *Id.* Although the court observed that the C&NW's interpretation of the agreements was "subject to challenge" (*id.*), the court concluded that (*id.* at 14a-15a): "Because C&NW's position has at least an arguable basis in the collective bargaining agreements and relevant past practice, it cannot be said to constitute the type of clear departure from those agreements necessary to trigger a finding of a § 6 major dispute under the RLA format."

Rail labor had argued that the nature of the impact of the sale on the employees' collective bargaining agreements, and the fact that rail labor was attempting to negotiate agreements to deal with the impact of that sale on employees, triggered the Railway Labor Act's major dispute resolution processes and required the district court to determine what "actual objective working conditions" must be maintained unchanged during the bargaining process. RLEA Brief in 7th Cir. No. 88-1504 at 28-46. Those arguments were rejected by the court of appeals because, the court stated, before the federal courts could order C&NW "to engage in negotiations under the § 6 RLA major dispute procedures . . . , we must conclude that there are no bona fide issues of contract interpretation presented here." Appendix A at 15a-16a n. 2. But, as the court added: "Given the nature and context of the current dispute between C&NW and the RLEA member unions, we are unable to reach that conclusion." *Id.*

This petition for a writ of certiorari has followed.

REASONS FOR GRANTING THE WRIT

There are currently three cases pending before this Court (*i.e.*, Sup. Ct. Nos. 88-217, 88-2049 and 87-1888) which involve a clear conflict among the courts of appeals as to whether the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, may be enforced in rail sale cases subject to regulation by the Interstate Commerce Commission under 49 U.S.C. § 10901. This case, petitioners respectfully submit, is inextricably entwined with those cases because this petition raises the question of exactly what Railway Labor Act rights are claimed to be overridden by the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* The nature and extent of the Railway Labor Act rights at issue in these sale cases, for logical and practical reasons, must be determined before this Court considers whether the Interstate Commerce Act supersedes the Railway Labor Act in *Ex Parte 392* sale cases.

Besides being intertwined with the conflict of law issues, this case also presents issues which, on their own, warrant review by this Court because of their importance to the orderly administration of the Railway Labor Act. Federal Courts are the sole tribunal available to rail labor to enforce the labor statute's notice, bargaining and status quo commands, but because of an overly broad and, rail labor submits, erroneous test being applied by the lower courts to classify disputes as being either "major" or "minor," federal courts are improperly abdicating their jurisdiction to enforce the labor statute's major dispute commands, and are instead referring rail labor to adjustment boards which have no power to enforce those commands. Rail labor respectfully submits that the lower court's decision in this case is inconsistent with the decisions of this Court in *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142 (1969), and *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330 (1960), and conflicts with decisions by the Third, Fifth and Eighth Circuits on the same matter.

I. This Case Is Inextricably Entwined With Several Petitions Which Are Pending Before This Court Seeking Review Of The Conflict Among The Circuits Over Whether Federal Courts Have Jurisdiction To Enforce The Railway Labor Act In Cases Arising From The Sale Of Rail Lines

Rail labor has long considered the just and equitable treatment of rail employees affected by railroad restructurings to be an important concern, and for over half a century has sought to achieve suitable job security arrangements through both the collective bargaining and the political processes. *E.g., Order Of Railroad Telegraphers v. Chicago & North Western Ry., supra,* 362 U.S. at 336-38. Those efforts have been successful, for by 1980 rail employees had various job security arrangements, including both collectively bargained and government imposed arrangements, available to them if they were placed in a worse position with respect to compensation or working conditions as a result of different carrier actions ranging from technological changes to abandonments or carrier consolidations. *E.g.,* Mediation Agreement, Case No. A-7128, February 7, 1965; 49 U.S.C. §§ 10903(b)(2) and 11347. However, in 1982, that balance was suddenly changed when the ICC refused to impose protective arrangements to aid employees affected by sales of existing lines of railroad to newly-formed rail carriers.[12] *Knox & Kane R.R.—Exemption,* 366 I.C.C. 439 (1982).

That policy of no ICC-imposed protective conditions in sale cases became solidified in *Ex Parte 392,* and has led to rail labor's efforts to use the collective bargaining

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[12] Sales of rail lines to existing carriers are within the scope of 49 U.S.C. § 11343(a)(2) and are thus subject to mandatory employee protections. 49 U.S.C. § 11347. Sales to newly-formed railroads are viewed as being within the scope of 49 U.S.C. § 10901 which governs "acquisitions" and gives the ICC discretion to impose employee protections.

process to obtain by bargaining the protective arrangement which the ICC is no longer providing. Rail management, however, maintains that it is under no obligation to bargain with rail labor for a replacement form of protective arrangement and has resisted rail labor's bargaining efforts. That resistance has led to numerous law suits, which in turn have led to the petitions for writs of certiorari in three cases that present a conflict among the circuits as to whether federal courts are deprived of jurisdiction to enforce the Railway Labor Act in rail sale cases exempted from Interstate Commerce Act regulation by *Ex Parte 392*. Sup. Ct. No. 88-217, *ICC v. Pittsburgh & Lake Erie R.R.*; Sup. Ct. No. 87-2049, *RLEA v. Chicago & North Western Transportation Co.*; and Sup. Ct. No. 87-1888, *Pittsburgh & Lake Erie R.R. v. RLEA*.

Respondent C&NW is a respondent in No. 87-2049, which is the case brought by petitioner RLEA asking this Court to review the Eighth Circuit's decision of May 31, 1988. *RLEA v. Chicago & North Western*, 848 F.2d 102 (8th Cir. 1988). In that case, the Eighth Circuit concluded that the ICC's jurisdiction over rail line sales relieved respondent C&NW from all obligations under the Railway Labor Act to bargain with rail labor for a replacement employee protective arrangement, and to preserve the status quo during that bargaining. Respondent C&NW has agreed with RLEA that the petition in No. 87-2049 "presents issues of critical importance to the railroad industry, its employees, and the public interest" (C&NW Brief in No. 87-2049 at 6), and it has joined rail labor in asking this Court to grant the writ in that case. *Id.* at 13. Indeed, as RLEA pointed out in its petition in No. 87-2049, that case presents an ideal vehicle to resolve the conflict of laws presented by the carriers' and the ICC's reliance on the Interstate Commerce Act to justify a refusal to bargain and to preserve the status quo in rail sale cases.

This case, petitioners respectfully submit, is inseparable from the petition in No. 87-2049, for several reasons.

First, both cases involve the sale of rail lines by the C&NW where that carrier has relied upon *Ex Parte 392* as justification for its insistence that the ICC's jurisdiction over rail line sales has relieved it of all notice, bargaining and status quo obligations under the Railway Labor Act concerning those sales. And second, in both cases, respondent C&NW has urged the courts to reject rail labor's efforts to enforce the labor statute's major dispute resolution processes because, the C&NW has asserted, the reduction in force provisions of its collective bargaining agreements,[13] together with its past practice of abandoning lines without first bargaining, make the underlying dispute a minor dispute—*i.e.*, one subject to the jurisdiction of the adjustment boards.

This case, however, differs from that presented in No. 87-2049 in that the Seventh Circuit did not rely upon the Interstate Commerce Act to conclude that the federal courts lacked jurisdiction to consider rail labor's complaints to enforce the Railway Labor Act. In No. 87-2049, the Eighth Circuit accepted the C&NW's conflict of laws argument, whereas, in this case, the Seventh Circuit accepted the C&NW's minor dispute argument to conclude that the Railway Labor Act's notice, bargaining and status quo obligations were not applicable. Nevertheless, that difference between the two cases emphasizes the need for this Court to accept both cases for review.

All involved in the rail industry agree that this Court should resolve the controversy over the impact of *Ex Parte 392* on rail labor's ability to bargain meaningfully about the impact of rail sales on employees. But, petitioners respectfully submit, a decision on whether the transportation statute supersedes the major dispute prescriptions of the labor statute will not finally resolve the

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[13] Those provisions require the C&NW to give a certain number of days advance notice of job abolishments and, in some cases, provide procedures for recalls when new jobs are established.

controversy over rail labor's bargaining rights so long as some courts are holding that those rights are not implicated in such sales. In other words, rail labor submits, before this Court decides whether the ICC's jurisdiction over rail sales supersedes the Railway Labor Act obligations of rail carriers, this Court should first decide what Railway Labor Act obligations are actually triggered by these sales.

Respondent C&NW has recognized the conjunctive relationship of the issues presented both by this case and by No. 87-2049, for it argued before the district court in that sale case that RLEA's complaint should be dismissed because the reductions in force provisions and its past practice in abandonment cases made the dispute a minor dispute over which the court had no jurisdiction. It raised that same argument in the Eighth Circuit as an alternative basis to uphold the lower court's judgment, and it advanced that argument successfully before the lower courts in this case.

This minor dispute argument, however, is not confined to the C&NW, for reduction in force provisions are common clauses in rail collective bargaining agreements and virtually all Class I and II rail carriers have a past practice of abandoning rail lines without first bargaining under the Railway Labor Act. *E.g., Decker v. CSX Transportation, Inc.*, 688 F. Supp. 98 (W.D.N.Y. 1988), *appeal pending*, 2d Cir. No. 88-7461 (argued July 18, 1988). Indeed, rail carriers are relying upon their reduction in force provisions and related past practice to argue that any dispute over their ability to sell a rail line without first bargaining is a minor dispute subject to the exclusive jurisdiction of the adjustment boards. *E.g., Decker v. UTU, supra*; *Atchison, Topeka & Santa Fe Ry. v. RLEA*, N.D. Ill. Civil Action No. 87 C 9847. Consequently, unless the validity of that argument is considered along with the conflict of laws issues, the controversy over rail sales and their impact on employees will

not be resolved fully by this Court's decision in No. 87-2049.

II. This Case Presents Issues Which Are Important To The Orderly Administration Of The Railway Labor Act, But Which Have Not Been Decided By This Court

Disputes under the Railway Labor Act over rates of pay, rules or working conditions have long been divided into two categories—*i.e.*, "major" and "minor." *E.g.*, *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 722-23 (1945). While the Act itself does not employ those terms, the Act does contain a definition of the two classes of disputes in Section 2, 45 U.S.C. § 151a; the first class —*i.e.*, "major disputes"—are "all disputes concerning rates of pay, rules, or working conditions" (45 U.S.C. § 151a(4)), whereas the second class—*i.e.*, "minor disputes"—are "all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. § 151a(5). In *Burley*, this Court gave a further definition to the two classes of disputes by referring to the understanding of the rail industry when the Railway Labor Act was amended in 1934 (Act of June 21, 1934, ch. 691, 48 Stat. 1185),[14] concluding that major dis-

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[14] George M. Harrison, the Chairman of RLEA in 1934, explained the two classes of disputes when he testified before a Senate committee on the 1934 Amendments:

> There are two classes of controversies that develop. One is what we call major changes, when we attempt to write a new contract or to revise a contract covering wages, rules, and working conditions.
>
> . . .
>
> . . . Now, the other class of controversy is the disputes that arise out of the application of that agreement to the practical situation on the railroad. . . . There are a thousand and one different kinds of controversies that can develop. Those are the controversies that will be settled by the national board. The

putes concerned changes to existing rates of pay, rules or working conditions for the future, whereas minor disputes contemplate the "existence of a collective agreement already concluded" and a claim "to rights accrued . . . ." 325 U.S. at 723.

This case, petitioners have argued, presents a dispute over changes to rates of pay, rules and working conditions for several reasons. First, the carrier's actions in selling the line would change, but not violate, the seniority rights of the employees because the sale will transfer the work opportunities around which those seniority rights have been negotiated. And second, rail labor recognized that the current agreements did not address the effects of *Ex Parte 392* sales, and has sought to negotiate agreements that do deal with these effects in a satisfactory manner. Respondent C&NW, however, asserted that since the current agreements provide the procedure which should be followed in abolishing jobs without any indication that the cause of the abolishment is relevant, its actions in affecting employees as a result of this sale are justified by the collective bargaining agreements; consequently, its argument continued, this dispute is actually one over the interpretation and application of those contractual provisions, and, thus, is within the exclusive jurisdiction of the adjustment boards.

Whether a dispute is considered to be major or minor is important because the Railway Labor Act provides diametrically different procedures to govern those disputes. Major disputes are subject to the Act's status quo obligation which prohibits either party to the dispute from changing "those actual, objective working conditions and practices, broadly conceived, which were in effect

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parties in the first instance have agreed on the contract; they have laid down rules.

Hearings on S. 3266 Before Senate Committee On Interstate Commerce, 73rd Cong., 2d Sess. at 33-34 (1934) (testimony of G.M. Harrison).

prior to the time the pending dispute arose and which are involved in or related to that dispute." *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142, 153 (1969). Minor disputes are not subject to that restriction, and thus a carrier may act on its interpretation of the agreements.

A second distinction between the two classes of disputes lies in the procedures adopted by the Act for their resolution. Major disputes are subject to the notice, bargaining and mediation provisions of the Act. Disputes still unresolved at the conclusion of those processes may be resolved by arbitration, but only if both sides agree. 45 U.S.C. § 157 First. If either party to the dispute refuses to arbitrate and the status quo period has expired (*see*, 45 U.S.C. § 160), the parties may use self-help to resolve the dispute. Minor disputes, on the other hand, are not subject to the Act's notice provision, but are required to be "conferenced"—*i.e.*, negotiated. 45 U.S.C. § 152 Sixth. If unresolved at the conclusion of the conferencing process, the dispute is to be resolved by the adjustment board process established by Section 3 of the Act, 45 U.S.C. § 153, if either party so requests. That process is a form of compulsory arbitration. *E.g.*, *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30 (1957).

Because of the different dispute resolution processes, and primarily because of the difference in the applicability of the Act's status quo requirement, whether a dispute is to be classified as being major or minor is extremely important to the orderly administration of the labor statute and to the rights given by that Act to rail labor. Indeed, the importance of the classification issue is well understood by both labor and management. *E.g.*, *Rutland Ry. v. Brotherhood of Locomotive Engineers*, 307 F.2d 21, 33 (2d Cir. 1962). This Court, however, except for defining the two classes of disputes in *Burley*, has not addressed the classification question directly, but rather,

has left the development of the manner in which those classifications should be made to the appellate courts.

Over the past four decades, the appellate courts have gradually developed the test which was enunciated by the Seventh Circuit in this case. Under that test, a federal court called upon to enforce the notice, bargaining or status quo commands of the Railway Labor Act should first determine whether the carrier asserts that the change in rates of pay, rules or working conditions is justified by its collective bargaining agreements, either written or implied from past practice. If a contract interpretation or application issue is presented, the dispute is to be classified as minor unless the claims of contractual justification are "frivolous" or "obviously insubstantial." Appendix A at 10a-11a. *Compare, IAM v. Soo Line R.R.*, 850 F.2d 368, 376-80 (8th Cir. 1988) *(en banc), with, Southern Ry. v. Brotherhood of Locomotive Firemen*, 384 F.2d 323, 327 (D.C. Cir. 1967). This essentially myopic test, rail labor submits, represents a substantial departure from the manner in which some appellate courts had approached the classification issue years ago. *See, Southern Ry. v. Brotherhood of Locomotive Firemen*, 337 F.2d 127 (D.C. Cir. 1964).

Because this Court has not given the appellate courts clear guidance on this issue, there is a lack of uniformity in the application of that standard. Moreover, some courts have failed to recognize that the classification of disputes as being major or minor cannot be determined by the application of a myopic standard which looks solely to whether a contract justification claim has been raised by the carrier. This uneven approach to rail labor disputes has resulted in comparable disputes being classified differently, *compare, RLEA v. Norfolk & Western Ry.*, 833 F.2d 700 (7th Cir. 1987), *with RLEA v. Consolidated Rail Corporation*, 845 F.2d 1187 (3d Cir. 1988), *pet. for cert. pending*, Sup. Ct. No. 88-1, and it has allowed the federal courts to abdicate their jurisdiction to

enforce the statutory commands of both the Railway Labor Act and the Norris-LaGuardia Act in favor of the jurisdiction of the adjustment boards which have no authority to interpret or to enforce those statutory rights. Indeed, some appellate courts, including the Seventh Circuit in this case, are applying a presumption that disputes are minor. Appendix A at 11a-12a (if there is any doubt as to classification, the "court will construe the dispute to be minor").

This expansion of the minor dispute classification so that it now encompasses most rail labor disputes is of grave concern to rail labor, for once the lower courts determine that a dispute is minor, they conclude that the federal courts lack jurisdiction over the controversy, including rail labor's request to enforce the Act's notice, bargaining and status quo obligations. Appendix A at 17a-18a. Also, following that classification, the courts will enjoin a carrier from changing the status quo only if such injunctive relief is necessary both to preserve the jurisdiction of the adjustment board and to prevent irreparable harm to the employees. *Id.* at 20a. In practice, such injunctive relief is rarely given.

Rail labor respectfully submits that the compulsory nature of the adjustment board procedures were never intended to be applicable to "disputes concerning *changes* in rates of pay, rules, or working conditions;" rather, those compulsory resolution processes were intended to apply to "only the minor cases growing out of the grievances or out of the interpretation or application of agreements." *Hearings on S. 3266 Before Senate Committee On Interstate Commerce, supra* note 13 at 17 (testimony of Joseph B. Eastman) (emphasis added). Moreover, rail labor submits, the sponsors of the 1934 amendments did not view that legislation as outlawing strikes over changes in working conditions, even if combined with an interpretation issue; the validity of this assertion may be seen from Commissioner Eastman's response to the ques-

tion of whether the legislation his office had drafted was intended to prohibit rail labor from striking over unfavorable adjustment board awards; as Commissioner Eastman replied:

> I may say, so far as I am concerned, it had not seemed to me that matter was a contingency of importance, because I cannot conceive of organizations striking over the settlement of grievances, particularly when they had been passed upon by an impartial tribunal under Government auspices.
>
> It is a serious enough thing to strike when a major matter is involved; but when you have only minor grievances and they have had full opportunity to be heard and have had their day in court before a tribunal, it hardly seemed to be that that was a question that was likely to arise. . . .

Hearings on H.R. 7650 Before House Committee On Interstate And Foreign Commerce, 73rd Cong. 2d Sess. at 63-64 (1934) (testimony of Joseph B. Eastman).

Besides being contrary to the intent of the sponsors of the 1934 legislation, the expansive, undiscerning test used by the appellate court in this case to encompass a dispute over *changes* in rates of pay, rules or working conditions, ignores the commands of Section 2 Seventh of the Railway Labor Act, which also trace their genesis to the 1930's rail legislation.[15] Section 2 Seventh provides that: "No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this

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[15] The commands of that section were first included as Section 77(o) of the Bankruptcy Act amendments in 1933, Pub. L. No. 420, 72nd Cong., 2d Sess., 47 Stat. 1467, 1481, and then made applicable to all railroads by Section 7(e) of the Emergency Railroad Transportation Act of 1933, ch. 91, 48 Stat. 211, 214. They were then added to the Railway Labor Act by the 1934 amendments and have not been changed since.

Act." 45 U.S.C. § 152 Seventh. Federal courts clearly have jurisdiction to enforce the commands of that statutory provision (*e.g., Brotherhood of Railway Clerks v. Florida East Coast Ry.*, 384 U.S. 238 (1966)), and thus a question is presented as to whether the federal courts, when ruling on a suit to enforce Section 2 Seventh, are precluded by the adjustment boards' jurisdiction over contract interpretation issues from determining whether the carrier is *changing* rates of pay, rules or working conditions, or whether that change is being accomplished in the manner "prescribed in such agreements . . . ." This Court touched upon this issue in *Order of Railroad Conductors v. Pitney*, 326 U.S. 561 (1946), but did not address the question of the scope of federal court jurisdiction over Section 2 Seventh.

Moreover, since this case involves the carrier's request to the federal courts for an injunction in a labor dispute, the limitations of the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, upon the jurisdiction of the federal courts must be considered. *Pitney* did not deal with the strictures of the Norris-LaGuardia Act, Section 8 of which expressly deprives a complainant of standing to obtain an injunction if that complainant "has failed to comply with any obligation imposed by law which is involved in the labor dispute in question . . . ." 29 U.S.C. § 108. In this case, respondent C&NW was granted an injunction even though rail labor maintained that the carrier had violated its obligations under Sections 2 First, 2 Seventh and 6 of the Railway Labor Act to give notice and to bargain over the impact of the sale on employees, and to maintain the status quo until that bargaining was completed. Federal courts clearly have jurisdiction to examine that standing challenge, but in this case that challenge was rejected solely because the C&NW had presented a non-frivolous, albeit questionable, assertion that its reduction in force contractual provisions authorized the job abolishments which will occur once it sells the Duck Creek South lines.

Petitioners respectfully submit that this Court should examine the relationship between the federal courts' jurisdiction under Section 2 Seventh and 6 to classify disputes, and the jurisdiction of adjustment boards under Section 3 of the Act to interpret collective bargaining agreements. In view of the manner in which the lower courts have expanded the minor dispute classification far beyond the intent of the 1934 amendments, so as to virtually repeal Section 2 Seventh, a review by this Court of that relationship is now urgently needed.

III. This Case Presents Important Questions Of Law Which Have Been Decided By The Seventh Circuit In A Manner Which Is Inconsistent With Decisions By This Court On Related Matters, And Conflicts With Decisions By Other Courts Of Appeals On The Same Subject

Although this Court has not decided the precise questions presented by this petition, it has decided several cases which establish that the classification standard applied by the court of appeals in this case is an inappropriate standard to determine whether federal courts have jurisdiction to enforce the Railway Labor Act's major dispute resolution procedures. Moreover, several courts of appeals have addressed the same proposed changes and bargaining requests which are involved here and have concluded, in direct conflict with the Seventh Circuit's decision, that the Act's major dispute processes had been triggered. Even though the Seventh Circuit attempted to distinguish two of those conflicting appellate court cases, the decisions are irreconcilable. Because of this conflict over an important question of law, and in view of the manner in which the appellate court's decision in this case deviates from prior decisions by this Court, petitioners submit, this Court should accept this case for review.

In *Order of Railroad Telegraphers v. Chicago & North Western Ry., supra*, this Court addressed whether a rail union had a right to bargain over a railroad's decision

to close several stations and to consolidate the work of employees represented by that union. *See, First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 686 n.23 (1981). That factual situation is comparable to this case, for here the C&NW plans to take an action which will have the effect of eliminating work opportunities and employees' seniority rights. Moreover, in *Telegraphers*, as is true in this case, the union served its own notice upon the carrier under Section 6 of the Railway Labor Act to bargain for an arrangement which the union believed would adequately protect its members. As occurred here, the carrier in *Telegraphers* asserted that the Railway Labor Act's major dispute procedures had not been triggered because, among other reasons, the union's Section 6 notice was barred by the contract moratorium clause (*see*, note 6, *supra*), and the dispute was thus a minor dispute. This Court rejected that argument by stating (362 U.S. at 341):

> Only a word need be said about the railroad's contention that the dispute here with the union was a minor one relating to an interpretation of its contract and therefore one that the Railway Labor Act requires to be heard by the National Railroad Adjustment Board. . . . [I]t is impossible to classify as a minor dispute this dispute relating to a major change, affecting jobs, in an existing collective bargaining agreement, rather than to mere infractions or interpretations of the provisions of that agreement.

While the C&NW's predecessor did not argue in that case that the reduction in force provisions of its collective bargaining agreements with the Telegraphers authorized it to abolish jobs, and thus presented a contract justification for its actions, the rationale of this Court's decision that the case presented a major dispute is clearly inconsistent with the major-minor classification standard applied by the court of appeals in this case. In *Telegraphers*, the carrier had presented a contract justifica-

tion for its refusal to bargain over the union's Section 6 notice and that justification was not frivolous or obviously insubstantial. *See*, Sup. Ct. No. 100, 1959 Term, Brief for Respondent at 20-21. Nevertheless, this Court looked to the nature of the dispute, which concerned proposed *changes* to existing working conditions, to determine whether that dispute was subject to bargaining and mediation, or to the adjustment board processes.

This Court's implicit rejection of the appellate courts' classification standard is further evident when this case is viewed in the light cast by *Detroit & Toledo Shore Line R.R. v. UTU, supra.* In *Detroit & Toledo*, this Court explicitly rejected the carrier's assertion that the status quo, which the Railway Labor Act required be maintained during the major dispute resolution processes, consisted solely of those working conditions established in the written contracts. 396 U.S. at 153-55. Rather, this Court concluded that the status quo obligation of the Act required the carrier to preserve unchanged more than contractually established working conditions. As the Court held, the carrier was required "to preserve and maintain unchanged those actual, objective working conditions and practices, *broadly conceived*, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute." 396 U.S. at 153 (emphasis added). Finally, *Detroit & Toledo* establishes the jurisdiction of the federal courts to determine what actual objective working conditions make up the status quo. *See, Air Cargo, Inc. v. Local 851, IBT*, 733 F.2d 241, 246-47 (2d Cir. 1984).

When this case is examined in light of *Detroit & Toledo* and with a recognition that rail labor has been seeking in this case to bargain for an agreement to deal with the effects of the sale on its members, respondent C&NW's contract justification argument is actually a claim that the status quo includes its contractual right to affect employees in the manner set forth in the reduction in force provisions of its collective bargaining agree-

ments. Since rail labor, the C&NW's argument continues, disputes that interpretation of its contractual right to act in this manner during the status quo period, this case presents only a minor dispute. The court of appeals agreed with that classification, because it could not conclude that the C&NW's interpretation of the contractual rights which were to be preserved during the status quo period, was frivolous or obviously insubstantial.

Petitioners respectfully submit that the application of the major-minor classification standard to determine whether federal courts have jurisdiction over a dispute concerning what working conditions constitute the status quo, is entirely inconsistent with *Detroit & Toledo.* As Justice Marshall explained in his dissent in *Rutland Ry. v. BLE, supra,* 307 F.2d at 44-46, when he was a Circuit Judge, the application of a major-minor classification standard is "entirely erroneous once . . . a [Section 6] notice has been served." 307 F.2d at 46. This is so because as this Court subsequently held in *Detroit & Toledo,* the status quo "freezes" the working conditions as actually applied, and not as a carrier may subsequently assert are arguably included in its contracts. *See, Rutland Ry. v. BLE, supra,* 307 F.2d at 44-45 n.11; *Southern Ry. v. Brotherhood of Locomotive Firemen, supra,* 337 F.2d at 132-33. Moreover, *Detroit & Toledo* shows that the district court has the responsibility to determine what working conditions constitute the status quo, but, as occurred here, an application of the major-minor classification standard improperly abdicated that responsibility to the adjustment boards which are without authority to execute it. Petitioners respectfully submit that the relationship between *Detroit & Toledo* and the contractual status quo defense raised in this case presents an issue which by itself warrants the granting of this petition.

Finally, the appellate court's application of a myopic dispute classification test to this case is in direct conflict

with the decisions of the Third, Fifth and Eighth Circuits in *RLEA v. Pittsburgh & Lake Erie R.R.*, 845 F.2d 420 (3rd Cir. 1988), *pet. for cert. pending*, Sup. Ct. No. 87-1888; *United Industrial Workers v. Board of Trustees*, 351 F.2d 183 (5th Cir. 1965); and *Burlington Northern R.R. v. UTU*, 848 F.2d 856 (8th Cir. 1988), *pet. for rehearing pending*. In each of those cases the appellate court was faced with a carrier action contemplating the transfer of job opportunities to a new operator, and in each case the court concluded that the Act's major dispute resolution procedures were applicable.

In the Fifth Circuit case, the court specifically rejected the carrier's claim that the dispute was minor since, the carrier claimed, the job abolishments which occurred when its elevator operations were transferred to a lessee, were justified by the reduction in force provisions in its agreement. 351 F.2d at 187-89. In that case, the court specifically concluded that the dispute should not be viewed through the "major or minor lenses," but rather, had to be viewed realistically. 351 F.2d at 189.

Although the railroad in the Third Circuit case did not raise the minor dispute defense, it raised the argument which is actually being advanced by the C&NW here; namely, that the status quo included its right to sell. That argument was rejected by the Third Circuit. 845 F.2d at 431-32. The railroad in the Eighth Circuit case raised a status quo argument which was identical to the assertion advanced in this case by the C&NW, but, the Eighth Circuit did not view that defense as changing the essential character of the dispute. Indeed, in both cases, the courts concluded that the carriers' decisions to sell, and the impact which those decisions would have on employees, triggered the Railway Labor Act's notice and bargaining obligations. 845 F.2d at 428-30; 848 F.2d at 864 n.9.

In all three cases, the appellate courts recognized that the actions proposed by the carriers would change the

working conditions of the employees who would be affected by those actions, and that the parties had not previously included those specific carrier actions (*i.e.*, transfer of existing work opportunities) in their contracts. That approach to whether the Act's notice, bargaining and status quo obligations are implicated in rail labor's dispute with a carrier stands in sharp contrast to the one employed by the Seventh Circuit in this case. Here, the Court looked solely to the carrier's contention that its agreements dealt with job abolishments, and since that was how employees would be affected, the dispute, the court concluded, was one subject to resolution by the adjustment boards. That approach to federal court jurisdiction totally frustrates the Act's prohibition against changes in "rates of pay, rules, or working conditions of its employees, . . . except in the manner prescribed . . . in section 6," with which rail labor has attempted to comply in this case. But more important to this petition, the fact that the court of appeals had available to it a standard developed by the appellate courts which could be utilized to neutralize or avoid the notice, negotiations and status quo requirements of the Act in a dispute of the magnitude depicted by the circumstances of this case, demonstrates the necessity of this Court's examination of that standard to determine the extent to which federal courts have jurisdiction to enforce the Railway Labor Act.

CONCLUSION

For the reasons set forth herein, petitioners respectfully request that this Court grant the writ.

Respectfully submitted,

WILLIAM G. MAHONEY
JOHN O'B. CLARKE, JR.*
HIGHSAW & MAHONEY, P.C.
Suite 210
1050 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500
Attorneys for Petitioners Railway Labor Executives' Association, et al.

Date: September 16, 1988

* Counsel of Record

APPENDICES

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 88-1504

CHICAGO AND NORTH WESTERN TRANSPORTATION CO.,
FRVR CORPORATION, and
INTERSTATE COMMERCE COMMISSION,
Plaintiffs-Appellees,

v.

RAILWAY LABOR EXECUTIVES ASSOCIATION, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 88-C-444—Paul E. Plunkett, *Judge*

ARGUED APRIL 21, 1988—DECIDED AUGUST 23, 1988

Before WOOD, JR. and KANNE, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge.*

ESCHBACH, *Senior Circuit Judge.* Appellant Railway Labor Executives Association ("RLEA") appeals from the district court's order granting a preliminary injunction to appellee Chicago & North Western Transportation Company ("C&NW") barring a strike by RLEA's

constituent unions and denying RLEA's motion for a preliminary injunction barring the sale of C&NW's Duck Creek South line. We have jurisdiction over this matter pursuant to 28 U.S.C. § 1292(a)(1).

I

C&NW is a Class I rail carrier with operations in ten midwestern states. At present C&NW has approximately 9,000 employees. It is a party to eleven collective bargaining agreements with some fourteen unions representing its employees. Those unions are represented in this action by the RLEA. In the past twenty years C&NW has substantially reduced the size of its rail system by abandoning or selling unprofitable segments of track. Since 1981, its work force has been significantly reduced, including the elimination of a large number of craft jobs covered by the eleven collective bargaining agreements.

In 1987 C&NW decided to sell a portion of its system known as the Duck Creek South line to FRVR Corporation ("FRVR"). FRVR is a new corporation and is not a Class I rail carrier. That fact and the "short line" nature of the Duck Creek South line, brought the proposed sale within the reach of the expedited procedure for securing prompt Interstate Commerce Commission ("ICC") approval of certain regional and short-line railroad sales articulated in the Commission's decision in *Ex Parte No. 392*, 1 ICC2d 810 (1985), *aff'd sub nom. Illinois Commerce Comm'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987).[1] The proposed sale would result in the abolish-

[1] It is not necessary for the purposes of our analysis to fully recapitulate the course of events that lead the ICC to formulate the policy set forth in *Ex Parte No. 392*. It is sufficient to note that the new policy has its genesis in the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, and to briefly explain its primary features. The Staggers Act authorized the ICC to exempt from regulation a broad range of rail-related transactions deemed to be of limited scope. 49 U.S.C. § 10505(a). Acting pursuant to that statutory authorization, the Commission has developed a policy where-

ment of more than 300 craft jobs on the C&NW. The majority of the craft employees whose jobs on the Duck Creek South line would be eliminated (some 200) would be hired by FRVR. C&NW anticipates that the balance of the affected employees will be able to find positions in the remainder of its system.

On December 23, 1987 C&NW and FRVR filed a Verified Notice of Exemption and Petition for Clarification with the ICC with regard to the Duck Creek South line sale. Under the procedures established in *Ex Parte No. 392*, the Commission's authorization of the sale became effective on December 30, 1987. In December 1987 C&NW had informed the RLEA-represented unions of its intention to sell the Duck Creek South line. It did not serve notice on the unions under § 6 of the Railway Labor Act ("RLA" or the "Act"), 45 U.S.C. § 156, of an intent to change rates of pay, rules or working conditions. However, it did make one or more proposals to the unions pertaining to the payment of separation allowances to employees whose employment with C&NW would be terminated by the sale.

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by a short-line rail sale to a non-carrier (like FRVR) is automatically approved within seven days of the filing of an application with the ICC for exemption from regulation under the Interstate Commerce Act, unless the Commission disapproves the application for exemption. 49 CFR 1150.32(b). In *Ex Parte No. 392* the ICC announced its intention to exempt "substantially all" sales of rail lines to non-carriers from regulation under § 10901 procedures. 1 ICC2d at 816. One of the key ramifications of the ICC's new policy with regard to the approval of regional and short-line sales is the fact that the Commission no longer routinely imposes "labor protective conditions" on such sales. *Id.* at 815. These labor protective conditions, formerly imposed by the ICC as a routine part of its approval of a rail line sale, resulted in substantial pay and benefits protections being extended to the employees whose jobs were affected by such sales. In large part, the present dispute between C&NW and the RLEA member unions arises from the unions' efforts to negotiate pay, economic and other benefits to replace the protections formerly imposed by the ICC.

Upon learning of the planned sale of the Duck Creek South line, as early as October 1987, the several unions filed § 6 notices with C&NW seeking to negotiate an agreement covering the employees whose jobs would be affected. In February 1988 the unions served new § 6 notices on C&NW expressing their desire to negotiate severance notice requirements and wage, benefit and seniority protections for the craft employees who would be displaced by the sale of the Duck Creek South line. C&NW has refused to enter into negotiations with the unions under the RLA § 6 procedures.

On January 19, 1988 C&NW filed the present action under 28 U.S.C. § 2201 seeking a declaratory judgment that the proposed sale of the Duck Creek South line to FRVR and any labor protective provisions that might accompany it are subject to the exclusive jurisdiction of the ICC and therefore are not a proper subject of bargaining under the Railway Labor Act, 45 U.S.C. §§ 151-188 (1948). On February 22, 1988, FRVR's motion to intervene as a plaintiff was granted by the district court. On March 3, 1988, the ICC's motion to intervene as a plaintiff was granted.

Sometime in February 1988, C&NW informed the unions that the Duck Creek South line sale would be consummated on March 4, 1988. In response, the unions informed C&NW of their intent to strike if the sale went through without either an agreement being reached on the notice and other rights that would be afforded the employees displaced by the sale, or alternatively, an exhaustion of the RLA § 6 procedures. In response, on February 24, 1988, C&NW filed in the district court a motion for a temporary restraining order and a preliminary injunction to prevent the unions from striking. RLEA filed cross-motions to enjoin the sale and in opposition to the temporary restraining order and preliminary injunction sought by C&NW. Pending resolution of this

matter by the district court, C&NW agreed not to complete the Duck Creek South line sale and the unions agreed not to strike.

C&NW's motion and RLEA's cross-motion came before the district court for hearing on March 16, 1988. At the close of that hearing the district court announced its decision. The court refused to enjoin the Duck Creek South line sale, holding that it was without jurisdiction to do so because RLEA's effort to procure that injunction constituted an impermissible collateral attack on an ICC order. In so holding, the district court expressed its disagreement with the decision to the opposite effect of the U.S. Court of Appeals for the Third Circuit in *RLEA v. Pittsburgh & Lake Erie Railroad Co.*, 845 F.2d 420, 437-39 (3d Cir. 1988) (holding, *inter alia*, that an effort by RLEA to obtain an injunction to prohibit a railroad from selling its rail assets pending bargaining over the effects of the sale on employees under the § 6 dispute resolution procedures of the RLA did not constitute an impermissible collateral attack on the ICC's decision to permit the sale under its *Ex Parte No. 392* procedure).

The district court granted C&NW's motion for a preliminary injunction against the threatened strike. The district court based this second holding on its interpretation of the RLA. Applying and interpreting relevant precedent from our Circuit, the district court determined the dispute between the RLEA and C&NW to be a "minor dispute" under the RLA dispute resolution framework and therefore subject to the exclusive jurisdiction of the National Railroad Adjustment Board ("NRAB"). Finally, the district court refused to condition the preliminary injunction barring any strikes on a delay in the Duck Creek South line sale.

The district court ordered C&NW and the RLEA to proceed with the resolution of their dispute before the NRAB pursuant to the § 3 RLA procedures. 45 U.S.C.

§ 153. On March 24, 1988 our Court agreed to hear the RLEA's appeal on an expedited basis. C&NW and FRVR agreed to delay consummation of the Duck Creek South line sale pending the decision of the present appeal.

II

On this appeal we are asked to review the decision of the district court to grant a preliminary injunction barring a threatened strike by the several craft unions represented by the RLEA and the district court's concomitant decision to deny RLEA's request that it enjoin the Duck Creek South line sale. The district court's decision and the contentions of the parties focus upon the effect in this dispute of the RLA and the provisions of the Interstate Commerce Act pertaining to railroad carriers, 49 U.S.C. §§ 1-300. Our review of the district court's determinations of these questions of law is *de novo*. *Curtis v. Thompson*, 840 F.2d 1291, 1296 (7th Cir. 1988). *See also United States v. L'Allier*, 838 F.2d 234, 240 (7th Cir. 1988) (holding that a district court's determination of a question of law is reviewed *de novo*). We will address first the issues pertaining to the Railway Labor Act.

III

A. The Relevant RLA Case Law

The Railway Labor Act was enacted by Congress to promote stability in labor-management relations in the railroad industry by providing, *inter alia*, procedures designed to facilitate the orderly and peaceful resolution of labor-management disputes. *Brotherhood of Railroad Signalmen v. Burlington Northern Railroad Co.*, 829 F.2d 617, 619 (7th Cir. 1987) (citing *Leu v. Norfolk & Western Railway*, 820 F.2d 825, 827 (7th Cir. 1987)). Labor-management disputes that arise under the RLA are classified either as "major disputes" or "minor disputes." The "major dispute"/"minor dispute" distinction is essential

in that it determines which of the two RLA labor-management dispute resolution procedures a rail carrier employer and its unions must follow when a disagreement arises as to matters affecting employees represented by those unions. *Railway Labor Executives Association v. Norfolk & Wetern Railway Co.*, 833 F.2d 700, 703-04 (7th Cir. 1987).

> If a dispute is major, the parties must attempt to resolve it through negotiation, mediation [by the National Mediation Board] and possible presidential intervention [as contemplated by the procedures set forth in 45 U.S.C. §§ 154-160]. If a major dispute cannot be resolved, the union can strike in support of its position. If a dispute is minor, the parties first must attempt to resolve their dispute through negotiation. If negotiation fails, however, the parties must submit their minor dispute to the National Railway Adjustment Board for resolution. The NRAB's jurisdiction over minor disputes is exclusive. A minor dispute cannot be the subject of a strike.

Id. at 704 (citations omitted).

The terms "major dispute" and "minor dispute" are nowhere defined in the RLA. Rather, as our Court has previously observed, the "terminology is drawn from judicial gloss on the statute" that finds its origin in the U.S. Supreme Court's decision in *Elgin, Joliet & Eastern Railway v. Burley*, 325 U.S. 711, 722-27, 65 S. Ct. 1282, 1289-91 (1945). *National Railway Labor Conference v. International Association of Machinists and Aerospace Workers*, 830 F.2d 741, 746 (7th Cir. 1987).

The distinction between major disputes and minor disputes is an imprecise one. *RLEA*, 833 F.2d at 703. Nevertheless, it is clear that the primary point of reference in drawing this bifurcation is the collective bargaining agreement between the rail carrier and the involved

union(s). *Chicago & North Western Transportation Co. v. International Brotherhood of Electrical Workers, Local Union No. 214*, 829 F.2d 1424, 1427 (7th Cir. 1987). Thus, in *Burley, supra*, the Supreme Court defined major disputes and minor disputes in the following manner.

> [The term major dispute] relates to disputes over the formation of collective bargaining agreements or efforts to secure them. They arise when there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of legal rights for the future, not to assertion of rights claimed to have vested in the past.
>
> [The term minor dispute] contemplates the existence of a collective bargaining agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal charge in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, *e.g.* claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created for the future.

325 U.S. at 723, 65 S. Ct. at 1290.

Our Court has characterized the difference in the two types of RLA labor disputes in several different ways. A major dispute has been variously described as one "over the formation or alteration of [a] collective bargaining agreement[]," *Machinists*, 830 F.2d at 746, or as an "attempt to create a contract or change the terms of a contract," *IBEW*, 829 F.2d at 1427. *Accord Brotherhood of*

Locomotive Engineers v. Boston & Maine Corp., 788 F.2d 794, 797 (1st Cir.), *cert. denied*, —— U.S. ——, 107 S. Ct. 111 (1986). Consistent with the approach we have taken is the view of the Eighth Circuit which places within the major dispute category a proposed action by a rail carrier that "is a clear departure from the collective bargaining agreement." *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern Railroad Co.*, 802 F.2d 1016, 1017 (8th Cir. 1986).

An examination of our Circuit's earlier decisions disclose the following characterizations of minor disputes under the RLA. "A minor dispute is a dispute over the interpretation of an existing contract." *IBEW*, 829 F.2d at 1427. "Minor disputes do not involve fundamental changes in labor-management relations but rather focus on whether a change is arguably comprehended within an already existing collective bargaining agreement." *Burlington Northern*, 829 F.2d at 619. Our cases make one thing clear. In order to ascertain if a dispute between a rail carrier and the union(s) representing its employees is major or minor, we "must determine whether the dispute can be resolved by reference to an existing collective bargaining agreement." *RLEA*, 833 F.2d at 704.

If the dispute can be resolved by reference to the parties' collective bargaining agreement, *i.e.*, if it is "arguably comprehended within an already existing collective bargaining agreement," it is a minor dispute. *Burlington Northern*, 829 F.2d at 619. In ascertaining whether a rail carrier's disputed actions are justified by or fall within the parameters of an existing collective bargaining agreement, the courts are permitted to look to the "settled past practices of the parties" under that agreement. *See Brotherhood of Maintenance of Way Employees*, 802 F.2d at 1017. *See also Machinists*, 830 F.2d at 747 ("Collective bargaining agreements in the railroad industry

are, of course, contracts, and the custom and usage in the trade or the past course of dealing among the parties may well be relevant to a determination of any ambiguity in the contractual language."). "Within the railroad industry in particular, it is common practice to omit from written agreements non-essential practices that are acceptable to both parties." *RLEA*, 833 F.2d at 705.

Thus, in determining the range of employer actions that can arguably be said to fall within the scope of a collective bargaining agreement, we may properly consider both the agreement's express terms and "any well established practices that constitute a 'course of dealing' between the carrier and employees." *RLEA*, 833 F.2d at 705 (footnote omitted) (quoting *Detroit and Toledo Shore Line Railroad v. United Transportation Union*, 396 U.S. 142, 154, 90 S. Ct. 294, 301 (1969)). Our Court has acknowledged that an established past practice cannot be used to contradict the express language of a collective bargaining agreement in an effort to transmute a major dispute into a minor dispute. *RLEA*, 833 F.2d at 705, n. 4 (citing *Brotherhood of Railway Carmen v. Norfolk & Western Railway*, 745 F.2d 370, 376-78 (6th Cir. 1984). *See also Machinists*, 830 F.2d at 747 ("arguments from past practice may be relevant to the characterization of a dispute as major or minor, but it is also true that they most often have only a limited impact on the characterization") (footnote omitted).

In deciding whether a dispute can be resolved by reference to the existing collective bargaining agreement(s) and relevant established past practice, "[t]he court does not consider the merits of the underlying dispute; its role is limited to determining whether the dispute can be characterized as involving the proper application or meaning of a contract provision." *RLEA*, 833 F.2d at 704. *See also Maine Central Railroad Co. v. United Transportation Union*, 787 F.2d 780, 782 (1st Cir.), *cert. denied*, —— U.S. ——, 107 S. Ct. 169 (1986) (holding that where a

rail carrier has presented evidence that arguably supports its claim of a contractually-based past practice covering a matter in dispute "the court's inquiry must end; it is not for it to weigh, and decide who has the better of the argument"). "Where the parties disagree over whether the dispute can be resolved by reference to an agreement the dispute is minor unless the claims of contractual justification are 'frivolous' or 'obviously insubstantial.'" *Machinists*, 830 F.2d at 746 (quoting *Atchison, Topeka and Santa Fe Railway v. United Transportation Union*, 734 F.2d 317, 321 (7th Cir. 1984)). *See also RLEA*, 833 F.2d at 704; *Burlington Northern*, 829 F.2d at 619.

It is clear that the primary factor underlying this predisposition, in close cases, in favor of a "minor dispute" finding is the concern for minimizing the ocurrence of strikes in the rail transportation industry. *See Brotherhood of Locomotive Engineers v. Atchison, Topeka and Santa Fe Railway Co.*, 768 F.2d 914, 920 (7th Cir. 1985). Rail unions are not permitted to strike over minor disputes. *Burlington Northern*, 829 F.2d at 619 (citing *Brotherhood of Railroad Trainmen v. Chicago River & Indian Railway Co.*, 353 U.S. 30, 77 S. Ct. 635 (1957)). *See also RELA*, 833 F.2d at 704 ("A minor dispute cannot be the subject of a strike.").

> The primary objectives of the RLA are to promote stability in labor relations in the railroad industry and prevent strikes. Because a major dispute can escalate into a strike, if there is any doubt as to whether a dispute is major or minor a court will construe the dispute to be minor.

RLEA, 833 F.2d at 705 (citing *Detroit and Toledo*, 396 U.S. at 154, 90 S. Ct. at 301; *Leu*, 820 F.2d at 827; and *Atchison*, 768 F.2d at 920). In addition, we have cited the "need to protect the [NRAB's] exclusive jurisdiction over minor disputes" as another reason for the corollary that "'when in doubt, the court construes disputes as

minor.'" *Machinists*, 830 F.2d at 746 (quoting *Atchinson*, 768 F.2d at 920).

B. The Major Dispute-Minor Dispute Determination

Our review of the district court's determination that the present dispute between C&NW and RLEA is a minor dispute under the RLA scheme is guided by the preceding summary of the extensive relevant precedent in our Circuit. Because C&NW claims that its controversy with RLEA arising from the proposed sale is a minor dispute, it can properly be assigned the burden of proving that assertion. The preceding analysis demonstrates that the employer's burden is "relatively light". *Burlington Northern*, 829 F.2d at 619. *See also Brotherhood of Maintenance of Way Employees*, 802 F.2d at 1022.

RLEA attempts to frame this dispute as one pertaining to the changed pay, seniority status and working conditions that will be encountered by the current C&NW employees whose employment rights will be affected by the proposed sale of the Duck Creek South line. RLEA insists that C&NW does not have a right under the collective bargaining agreements to abolish jobs within the context of a rail line sale and concurrently refuse to negotiate over the effects of that sale on its present employees. The RLEA constituent unions have served § 6 notices on C&NW seeking changes in the current collective bargaining agreements pertaining to the pre-sale/job abolishment and post-sale/job abolishment status of the employees who will be affected by the proposed sale. Given that fact, and because no provision of the current agreements expressly grants C&NW the right to sell a rail line and abolish jobs without negotiating over the effects of that sale, RLEA insists that C&NW cannot be permitted to claim that this controversy is one that can be resolved based on the existing collective bargaining agreements.

C&NW first notes two aspects of RLEA's position which it believes to be of significance. RLEA does not challenge C&NW's right under the collective bargaining agreements to abolish jobs once the work assigned to those positions is no longer available. Second, RLEA concedes that the present contractual provisions, unless changed, will continue to govern the employment-related rights of the current C&NW employees who will be affected by the Duck Creek South line sale. In its own substantive argument, C&NW contends that the job abolishment, layoff and reassignment actions it will take as a result of the Duck Creek South line sale are fully authorized by the collective bargaining agreements. C&NW insists further that it has for some twenty years taken similar actions (*i.e.*, discontinuing operations on certain portions of track and concurrently abolishing jobs and laying off and reassigning employees) without objection from the RLEA unions (with one recent exception) and without a demand from the unions that the § 6 RLA procedures be initiated.

We are not concerned with the relative merits of the parties' arguments as to whether the actions C&NW would take with regard to the employees affected by the Duck Creek South line would violate or are sanctioned by the current collective bargaining agreements between C&NW and the RLEA unions. *See RLEA*, 833 F.2d at 705; *Maine Central Railroad*, 787 F.2d at 782. Ascertaining the actual validity of C&NW's claims of contractual justification is a task falling outside the limited role of the federal courts in rail carrier-union disputes arising under the RLA. Rather, our charge is to determine if the subject matter of the parties' dispute is "arguably comprehended" within, and potentially amenable to resolution by reference to, their existing collective bargaining agreements and the attendant established past practices not in conflict with the terms of those agreements. *See RLEA*, 833 F.2d at 704-05; *IBEW*, 829 F.2d at 1427; *Burlington Northern*, 829 F.2d at 619; *Machinists*, 830 F.2d at 747.

We have carefully evaluated the claims of the parties and examined the evidence in the record as to the terms of their collective bargaining agreements and the relevant past practices attendant to those agreements. There can be no doubt that the agreements and past practices arising thereunder embrace matters of job abolishment, layoff and reassignment resulting from a layoff with regard to the individuals affected by the Duck Creek South line sale who are able to retain their employment with C&NW. In addition, C&NW's claim that the agreements and attendant past practices extend to the related matters of its obligation to employees who are laid off after their positions are abolished appears to have at least some factual support.

It is true that the agreements are silent with regard to C&NW's obligation to provide, or its ability to avoid, the type of ameliorative, post-termination benefits sought by the RLEA unions. Thus, C&NW's contentions that the collective bargaining agreements contemplate abolishment of jobs without any of the severance-related benefits sought by the RLEA unions is based primarily, if not exclusively, on its claims as to the past practice or course of dealing under the provisions of the agreements that pertain to job abolishment and layoff. However, because nothing in the record indicates that the purported body of past practice relied on by C&NW is inconsistent with the express provisions of the agreements, this argument by C&NW cannot be rejected out of hand.

Our analysis leaves us convinced that even though C&NW's interpretation of the agreements and its contentions are subject to challenge, they are at least plausible. *See Machinists*, 830 F.2d at 748. Because C&NW's position has at least an arguable basis in the collective bargaining agreements and relevant past practice, it cannot be said to constitute the type of clear departure from those agreements necessary to trigger a finding of a § 6

major dispute under the RLA format. *See Brotherhood of Maintenance of Way Employees*, 802 F.2d at 1022.[2]

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[2] The primary focus of RLEA's concern with the proposed Duck Creek South line sale is the fact that the current collective bargaining agreements between C&NW and the RLEA unions do not provide their members who will lose their jobs with C&NW with the type of additional severance benefits formerly imposed as a matter of course by the ICC as a condition of approving a proposed rail line sale. The record indicates that former C&NW employees who go to work for FRVR will experience a reduction in pay and benefits and will lose the seniority standing they had accrued with C&NW. That the current collective bargaining agreements between C&NW and the RLEA member unions do not contain provisions pertaining to the pay, benefits and seniority standing of C&NW employees whose jobs are abolished and who subsequently accept employment with another rail carrier is not surprising.

RLEA attempts to bring the issues of the post-job abolition pay, benefits and seniority status of the individuals who will go to work for FRVR within the scope of the bargaining relationships between its constituent unions and C&NW by characterizing the change in the status of the current C&NW employees whose jobs with C&NW will be abolished by the Duck Creek South line sale as a "transfer" of their employment by C&NW to FRVR. That characterization is inaccurate. Those employees whose employment with C&NW is terminated who choose to accept positions with FRVR will not be transferred by C&NW. Their jobs with C&NW will be abolished. Thus, if and when the Duck Creek South line sale is consummated, CNW's actions as an employer rail carrier under the RLA will be limited to those concerned with the abolition of existing jobs and the layoff and/or reassignment of the employees whose positions are abolished. It is within this context that the minor dispute/major dispute determination called for by the RLA must be made in this case.

The actions of RLEA's member unions are understandable, especially in light of the ICC's current predisposition against imposing labor protective provisions as a prerequisite to approving rail line sales of the type at issue here. But in order to achieve the outcome sought by RLEA, *i.e.*, an order compelling C&NW to engage in negotiations under the § 6 RLA major dispute procedures and eventually submit its disagreements with the unions to the full range of dispute resolution devices provided thereunder, we must conclude that there are no bona fide issues of contract

Our precedent clearly dictates that in a circumstance such as the present one, where a rail carrier and a union(s) disagree as the proper categorization of a labor dispute under the RLA, the federal courts must delineate a matter a minor dispute unless the carrier's claims of contractual justification are so frivolous or obviously insubstantial as to indicate that it is attempting to circumvent the § 6 RLA major disputes resolution procedure. *Machinists*, 830 F.2d at 746, *RLEA*, 833 F.2d at 704; *Burlington Northern*, 829 F.2d at 619. This is particularly true in controversies involving job abolition. *Machinists*, 830 F.2d at 749 ("It has been held before that where a collective bargaining agreement is susceptible of a non-frivolous interpretation allowing job abolition, disputes over actions effecting such job abolition are minor."). Given the arguable contractual/past practice bases for C&NW's position, we cannot conclude that it is either frivolous or obviously insubstantial.

Juxtaposition of the foregoing analysis as to the nature of the present controversy between C&NW and the RLEA-represented unions with the precedent in our Circuit and the remaining body of relevant RLA law, compels us to agree with the district court's categorization of this matter as a minor dispute under the RLA.[3] The district court's holding to that effect will be affirmed.

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interpretation presented here. Given the nature and context of the current dispute between C&NW and the RLEA member unions, we are unable to reach that conclusion.

[3] We have carefully examined the three key cases relied on by RLEA to support its claim that this case involves a major dispute under the RLA and we believe that none of the three is pertinent to our analysis. *Railway Labor Executives Association v. Pittsburgh & Lake Erie Railroad Co. ("P&LE")*, 845 F.2d 420 (3d Cir. 1988), does present a fact situation similar to the present case. However, there are two distinct features of the fact situation in that case which distinguish it from our case. First, *P&LE* did not involve a rail carrier selling a small portion of its rail lines to a non-carrier. Rather, the rail carrier in *P&LE* proposed to sell its

C. The Remaining RLA Issues

The categorization of this matter as a minor dispute under the RLA establishes several additional facts relevant to our review of the district court's actions. First,

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entire rail operation to a non-carrier corporation. Second, and more importantly, there is no indication in the analysis by the Third Circuit in *P&LE* that it considered the effect of a claim by a rail carrier employer that its actions pertaining to the employees whose jobs were to be abolished by the proposed sale were sanctioned by and proper under the collective bargaining agreements between the carrier and the unions representing its employees.

The contractual base relied upon by C&NW is the key to our analysis of the minor dispute/major dispute bifurcation under the RLA scheme. Because the Third Circuit in *P&LE* did not address that topic in any way, we do not find its analysis of the minor dispute/major dispute RLA issue to be relevant or persuasive. We note further that the Third Circuit's subsequent decision in *Railway Labor Executives Association v. Consolidated Rail Corporation*, 845 F.2d 1187 (3d Cir. 1988), can also be distinguished from our case in that the Court therein determined that the issue in dispute, a drug testing program unilaterally instituted by the rail carrier, was not within the terms and conditions of employment incorporated in the parties' collective bargaining agreement. *Id.* at 1193-94. Unlike the Third Circuit in *Conrail*, we have determined that the issues in dispute in our case are at least arguably embraced within the scope of the collective bargaining agreements between the RLEA unions and C&NW.

We also believe that the holding of the Fifth Circuit in *United Industrial Workers v. Board of Trustees of the Galveston Wharves*, 351 F.2d 183 (5th Cir. 1965), is not relevant to our analysis. *Galveston Wharves* involved a rail carrier who was effectively terminating all of its rail operations by leasing its rail facilities to another corporation. The key to the Fifth Circuit's rejection of the rail carrier's claim that its dispute with the union representing its employees was not proper for submission to the NRAB was the finding that the carrier's action in leasing out its entire rail operation was neither a "layoff" nor an exercise of the carrier's management prerogatives under the collective bargaining agreement. *Id.* at 189. Rather, the Court viewed the carrier's action, and the dispute itself, as one involving the termination of a collective bargaining agreement that triggered the RLA § 6 major dispute resolution procedures. *Id.* at 189-90. Nothing in *Gal-*

because it involves a minor dispute, this controversy is within the exclusive jurisdiction of the NRAB. *RLEA*, 833 F.2d at 704. *See also Missouri Pacific Railroad Co. v. United Transportation Union*, 782 F.2d 107, 110 (8th Cir. 1986), *cert. denied*, —— U.S. ——, 107 S. Ct. 3209 (1987). *IBEW*, 829 F.2d at 1428 ("Minor disputes . . . must be referred to binding arbitration under the auspices of the National Railroad Adjustment Board.") The role of the federal courts in RLA minor disputes is very limited. Although they may determine the proper classification of a dispute under the RLA scheme, federal courts are prohibited from becoming involved in the merits of minor disputes. *Burlington Northern*, 829 F.2d at 620 ("The Railway Labor Act . . . prohibits federal courts from becoming involved in minor disputes. Minor disputes must be resolved through an arbitration process that is subject to very narrow judicial review."). Therefore, we conclude that the district court correctly determined that because the present controversy is a minor dispute under the RLA, it is subject to the exclusive jurisdiction of the NRAB, and must be resolved under the Act's § 3 RLA procedures. 45 U.S.C. § 153.

The second significant ramification of the minor dispute categorization pertains to the district court's determination that the strike threatened by the RLEA member unions should be enjoined. Strikes over minor disputes violate the RLA and may be enjoined by the federal courts in order to effectuate the RLA's purpose to provide for the compulsory arbitration of such matters by the NRAB. *Machinists*, 830 F.2d at 749 (citing *Chicago & Indian River*, 353 U.S. at 40-42, 77 S. Ct. at 640-41 (1957), and *Brotherhood of Locomotive Engineers v. Mis-*

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veston Wharves compels us to reach the result in a case, like ours, involving a sale by a rail carrier of a small portion of its track while maintaining the remainder of its rail operations and continuing to honor its collective bargaining agreements. Therefore, we deem that case inapposite here.

souri-Kansas-Texas Railway Co. (M-K-T), 363 U.S. 528, 531, 80 S. Ct. 1326, 1328 (1960)). *See also IBEW*, 829 F.2d at 1428; *Chicago & Northwestern Transportation Co. v. United Transportation Union*, 656 F.2d 274, 277 (7th Cir. 1981) (citing *Locomotive Engineers v. Louisville & Nashville Railroad Co.*, 373 U.S. 33, 83 S. Ct. 1059 (1963)).

Thus, it is clear that the federal courts may issue injunctions against strikes in minor disputes in order to protect the NRAB's exclusive jurisdiction over such matters. Because injunctions barring strikes in minor disputes are necessary to ensure the proper functioning of the § 3 RLA procedures, they are not proscribed by the *Norris-LaGuardia Act*. *Chicago River*, 353 U.S. at 40-41, 77 S. Ct. at 640-41. *See also Missouri Pacific Railroad Co.*, 782 F.2d at 110 (citing *Louisville & Nashville Railroad Co., supra*). For these reasons we must conclude that the district court acted properly in granting C&NW's motion for a preliminary injunction prohibiting the RLEA unions from striking during the pendency of the NRAB's adjudication of the current dispute.

One final question remains: the propriety of the district court's determination that it was without jurisdiction to grant RLEA's motion for a preliminary injunction to bar the Duck Creek South line sale. RLEA's argument in support of its motion is based solely on the claim that the present controversy is a major dispute under the RLA scheme. Once a district court finds that a major dispute exists, it may enjoin both the rail carrier and the union(s) from altering the status quo during the course of the negotiations and other impasse resolution procedures mandated by § 6 of the RLA. *Boston & Maine Corp.*, 788 F.2d at 797 (citing *Detroit & Toledo*, 396 U.S. at 155, 90 S. Ct. at 302). However, in the absence of a finding that a major dispute exists, a district court is without jurisdiction to issue a broad status quo injunc-

tion. *See Boston & Maine*, 788 F.2d at 797 (citing *Carbone v. Meserve*, 645 F.2d 96, 98 (1st Cir.), *cert. denied*, 454 U.S. 859, 102 S. Ct. 312 (1981). We have determined that the district court correctly categorized the parties' disagreements as to the proposed Duck Creek South line sale as a minor dispute. Accordingly, RLEA's claim that a status quo injunction of the type normally issued in RLA major disputes should have been granted by the district court in this case is moot and can be dismissed. The district court was without jurisdiction to issue such an injunction.[4]

It is true that the district court, in its discretion, could have conditioned the preliminary injunction barring the RLEA unions from striking on C&NW's abstention from consummating the Duck Creek South line sale.[5] In *Machinists*, *supra*, our Court observed that the Supreme Court has held that "if an injunction against strike activity is issued in a minor dispute the district court retains its traditional equitable power to balance 'competing claims of irreparable hardship' in light of the Railway Labor Act's mandate that the guideline for fashioning the injunction be preservation of the [NRAB's] jurisdiction." 830 F.2d at 750 (quoting *M-K-T*, 363 U.S. at 534-35, 80 S. Ct. at 1330). RLEA has failed to show

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[4] Because we find in the RLA sufficient basis for holding that the district court was without jurisdiction to issue the status quo injunction sought by RLEA, we need not address the district court's holding that it was without jurisdiction to issue that injunction because it deemed RLEA's motion therefor an impermissible collateral attack on the ICC order approving the Duck Creek South line sale.

[5] RLEA did not challenge the district court's refusal to indirectly proscribe the Duck Creek South line sale by conditioning the strike injunction on C&NW's willingness to postpone the sale until the NRAB procedures are completed. Nevertheless, to ensure a full and comprehensive treatment of the RLA issues presented by this case, we briefly address that question.

that a prohibition of the Duck Creek South line sale is necessary in order to preserve the NRAB's jurisdiction.

If the NRAB rejects C&NW's interpretation of the collective bargaining agreements and determines that the employees who are displaced by the challenged rail line sale are entitled to relief, it will be able to order the necessary payment of monies and adjustments in seniority levels it deems necessary to make those employees whole. Thus, it cannot be inferred that the legal remedy available to the RLEA unions in this case (via the NRAB arbitration procedure) is inadequate. Further, RLEA has failed to demonstrate that an order barring the Duck Creek South line sale during the pendency of the NRAB's adjudication of this controversy is necessary to prevent any irreparable harm to its constituent unions or the employees they represent. Accordingly, we cannot conclude that the district court abused its discretion when it failed to condition the preliminary injunction barring a strike in this dispute on a suspension of the Duck Creek South line sale.

IV

Based on the foregoing analysis, we will affirm the order of the district court granting C&NW's motion for a preliminary injunction barring the RLEA member unions from striking pending adjudication of the parties' dispute by the NRAB and denying RLEA's motion for a preliminary injunction barring the Duck Creek South line sale. The Railway Labor Act and the attendant relevant case law provide a full and proper basis for affirming the district court. Consequently, we need not resolve the additional issues, raised by the district court's opinion and addressed in the arguments of the parties, with regard to the effect of the Interstate Commerce Act.[6]

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[6] In their briefs, C&NW and Plaintiff-Intervenor/Appellee Interstate Commerce Commission ask us to decide two additional issues raised by the interface in this case between the Railway Labor

The order of the district court is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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Act and the Interstate Commerce Act. Those issues go to two questions: (i) whether RLEA's attempt to enjoin the Duck Creek South line sale constitutes an impermissible collateral attack on the ICC's decision to allow the sale to proceed; and (ii) whether the strike threatened by the RLEA unions could properly be enjoined by the district court in order to preserve what the ICC and C&NW maintain is the Commission's exclusive jurisdiction to determine "labor protection disputes" pertaining to the sale of rail lines. In the above analysis, we have determined that the relevant provisions of the RLA mandate that the injunction sought by the RLEA not issue and that the strike threatened by the RLEA unions be enjoined. Accordingly, we need not address the two additional Interstate Commerce Act-related issues raised by appellees.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PLUNKETT, Judge

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88 C 444

March 16, 1988

CHICAGO AND NORTHWESTERN TRANSPORTATION COMPANY, *et al.*

vs.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*

DOCKET ENTRY

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

Plaintiffs' motion for a preliminary injunction against a strike by its railroad unions is granted. Railway Labor Executives' motion for a preliminary injunction against the sale is beyond the jurisdiction of this court and is thus denied. Parties are to proceed with the rocolution [*sic*] of this dispute in accord with Section 3 of the Railway Labor Act. Oral motion Railway Labor Executives to certify record on appeal is granted.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY,
Plaintiff, Counter-defendant,

vs.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Defendants, Counter-plaintiffs.

Docket No. 88 C 444

Chicago, Illinois
March 16, 1988

TRANSCRIPT OF PROCEEDINGS
BEFORE HONORABLE PAUL E. PLUNKETT

PRESENT:

For Chicago and North Western:

MR. STUART F. GASSNER and
MR. JAMES P. DALEY
One North Western Center,
Chicago, Illinois
and
MR. RALPH J. MOORE, JR.
Shea & Gardner
Washington, D.C.

For Railway Labor Executives & unions:

MR. JOHN O'B. CLARKE, JR.
Highsaw & Mahoney, P.C.
Washington, D.C.

For the Interstate Commerce Commission:

MR. CLYDE J. HART, JR.
Attorney, ICC, 12th Street &
Constitution Ave., N.W. Wash. D.C.

For FRVR:

MS. EILEEN KAMERICK
Skadden, Arps—
Chicago, Illinois
and
MR. STEPHEN M. OLSON
Kirkpatrick & Lockhart
Pittsburgh, Pa.

AND OTHERS not identified to record.

* * * *

[94] THE COURT: Well, I have written out what I can only say I hope the Seventh Circuit can understand. I guess I will begin by thanking the lawyers in this case for educating a United States District Court Judge whose background in labor law is suspect, to say the least. We really had to start from ground zero. We spent a good deal of time on this. It was made easier by the, what I perceive to be splendid briefs filed by all the parties in the case. If they hadn't been of that high quality, I am doubtful I could have resolved the issue.

I begin with the question of whether or not we should enjoin the sale that the North Western Railroad wishes to consummate next Monday, and that is somewhat out of order, but I begin with it because I perceive it to be the easiest.

I cannot, I do not believe, enjoin the sale because I do not believe that a district court has the power [95] to do so when that sale has been approved by the Interstate Commerce Commission. Title 28 U.S.C. S. 2343 provides that "the court of appeals has excluded [*sic*] jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" ICC orders.

We note that a majority of the district courts faced with a union's request to enjoin an Ex Parte No. 392 line sale have refused to do so on the ground that the requested injunction would constitute an impermissible collateral attack on an ICC order. You can see that in Decker vs. CSX Transportation, 672 F. Supp. 674, WDNY 1987, and a series of other cases which I won't stop to enunciate now, but which will be put in the record through Mr. Betz.

(The same to read as follows:)

UTU v. Burlington Northern Railroad, 672 F. Supp. 1579 (D. Mont. 1987), RLEA v. City of Galveston (S.D. Tex., Nov. 4, 1987); RLEA v. Chicago & NW Transportation Co., 124 LRRM 2715 (D. Minn., Jan. 7, 1987); Burlington Northern RR v. UTU (W.D. Mo. Aug. 29, 1986).

We agree with all these courts that the rationale of the Second Circuit's decision in RLEA vs. Staten Island, 792 Fed 2d 7, Second Circuit 1968 [*sic*], wherein it affirmed the district court's refusal to enjoin an ICC-approved sale on the ground that the issuance of an injunction would constitute an impermissible collateral attack on an ICC order, [96] and that such a rule applies even where the transaction has not yet been consummated and the ICC's order approving the sale is not mandatory.

We simply disagree with the decision in RLEA vs. Pittsburgh & Lake Erie Railroad, where the court enjoined a similar line sale. That court, we believe, impermissibly allowed a collateral attack or the ICC order.

In short, we decline to enjoin this line sale because we believe that we do not have the power to issue an injunction against the consummation of such an ICC-approved sale.

That brings us to the issue of whether we should enjoin the threatened strike by the railroad unions. Initially we reject the idea that the Norris-LaGuardia Act must be or even can be "accommodated to" Section 10901 of the Interstate Commerce Act or the Interstate Commerce Act in general; in fact, we find that the anti-injunction provisions of the Norris-LaGuardia Act are not subordinated to or accommodated to the Interstate Commerce Act generally or Section 10901 in particular.

Neither the Interstate Commerce Act in general nor Section 10901 in particular is a comprehensive labor statute providing an alternative mechanism of dispute resolution which Congress could have intended to override the Norris-LaGuardia Act.

[97] We therefore find the Third Circuit's decision in Railway Labor Executives' Association vs. P&LE, 831 Fed 2d, 1231, Third Circuit 1987, persuasive on this point. We agree with that court that the Interstate Commerce Act is not comparable to the Railway Labor Act, parts of which are accommodated to the Norris-LaGuardia Act, for the ICA does not, unlike the Railway Labor Act, contain a comprehensive scheme of alternative dispute resolutions.

We decline to apply the Eighth Circuit's decision in Missouri Pacific Railroad Company vs. United Transportation Union, 782 Fed 2d 107, Eighth Circuit 1986, to this case. It is distinguishable on the ground that it involved Section 11341(a) of the Interstate Commerce Act, which, unlike Section 10901, requires the ICC to impose employee protective conditions. Also, we simply have doubts that that decision is correct.

Unlike the Eighth Circuit, we cannot find that the ICA is a labor statute. The ICA's provision for mandatory or discretionary power to deal with labor problems

under the aegis of a railroad sale, abandonment or reorganization does not in our view convert that statute into a comprehensive labor act. The whole purpose of the ICA is to protect the public interest by protecting and fostering railroads. The concerns with labor, while perhaps not peripheral, are not central.

[98] We do find, however, that the strike must be, and hereby is, enjoined under the Railway Labor Act. Under that act, the dispute before us is properly categorized as minor, rather than major, and the union is therefore enjoined from a strike over the sale, the loss of jobs or other effects of the sale.

A major dispute is a dispute over the formation or alteration of a collective bargaining agreement, while a minor dispute is a disagreement over the interpretation or application of such an agreement. Elgin, Joliet & Eastern Railway vs. Burley, 325 US 711 at 723, 1946.

The rules established in this circuit for determining whether a dispute is major or minor are as follows: The Seventh Circuit has indicated that the magnitude of the impact on the railroad's operation and, indeed, the union's interests is unlikely to affect the characterization, because the distinction turns on whether reference to the collective bargaining agreement will resolve the dispute. National Railway Labor Conference vs. International Association of Machinists, 830 Fed 2d 741 at 747, note 5, Seventh Circuit 1987. There the Court stated:

> "To ascertain if a dispute is major or minor, the Court must determine whether or not the dispute can be resolved by reference to an existing collective bargaining agreement. If, as here, the parties [99] disagree as to this, the dispute is minor unless the carrier's claims of contractual justification are 'frivolous' or 'obviously insubstantial.' "

The fact that a carrier's contract interpretation is questionable, and may be wrong, does not make it frivolous.

Furthermore, because any major dispute can escalate into a strike, if there is any doubt as to whether a dispute is major or minor, a court should construe the dispute to be minor. Norfolk & Western, 833, Fed 2d at 705.

Rail labor argues that the railroad's attempt to abolish jobs as a result of the line sale without first bargaining with the union is an attempt to effectuate a unilateral change in rates of pay, rules or working conditions, therefore, it is an alteration of the contract and therefore a major dispute.

The railroad, on the other hand, claims that this is a minor dispute because it concerns the interpretation or application of the reduction in force clauses of the contracts between the railroad and the unions. These reduction in force clauses, bargained for and accepted by the unions, state that when reductions in force or job abolishments become necessary, the employees will be given notice (generally five days) and the layoffs will be made in accordance with the seniority system.

[100] The railroad contends that job abolishments are clearly contemplated under these provisions and that the railroad therefore has the authority to implement the job abolishments which will result from this line sale without first bargaining with the union.

As we said, we believe that this is a minor dispute, because the railroad's claims of contractual justification are not "frivolous" or "obviously insubstantial." It is, of course, questionable as to whether or not the reduction in force provisions encompass layoffs which result from this particular situation, namely, the sale of a line, a situation which is not necessarily treated the same way as an abandonment under the agreements.

The union has essentially agreed in its contracts with the railroad that the C&NW may make any cutbacks necessary to remain profitable—for instance, through abandonment. The union argues, however, that the Duck Creek South line is still "marginally profitable" and that

a sale is quite different than abandonment because the railroad is not just closing down a line, but selling it, presumably under favorable terms.

The union may be correct, but it is not our prerogative to decide such a dispute. While the railroad's interpretation of the contract is subject to question, "the fact that a contract interpretation is questionable, and may [101] be wrong, does not make it frivolous." Again, National Railway Labor Conference vs. International Association of Machinists, 830 Fed 2d 741 at 749, Seventh Circuit 1987.

The Supreme Court has deemed disputes minor where "the dispute relates either to the meaning or proper application of a particular provision with reference to a particular situation or to an omitted case." Elgin, 325 US at 723.

We therefore conclude that this dispute should be characterized as minor.

We note that the railroad also contends that it has a past practice of abolishing jobs without bargaining with the union and that this practice is incorporated into the contract, therefore justifying its actions in regard to this line sale. In regard to past practice, we are well aware that the arguments from past practice will often have only a limited impact on the characterization of a dispute. Labor Conference, 830 Fed 2d at 746-47; Norfolk & Western, 833 Fed 2d at 705, Note 4.

However, where the contract is silent on a particular issue, past practice may be considered of some relevance in characterizing the dispute. Norfolk & Western, 833 Fed 2d at 705, note 4. Here it is of course subject to question whether the railroad's past practice of abolishing jobs without first bargaining with the union in connection [102] with abandonments has become part of the contract, and, if so, whether that practice also establishes a contractual right to abolish jobs or lay off employees without first bargaining in connection with a line sale. However, it seems to us that the railroad's past

practice is of at least some relevance here and may arguably bolster their contractual justification argument.

We wish to make it clear that we believe the contractual language alone is enough to make the railroad's argument of contractual justification non-frivolous. Nonetheless, its argument from past practice seems to us at least marginally relevant to its contractual justification argument and reinforces our thinking that this is indeed a minor dispute because it can be resolved with reference to the collective bargaining agreement.

Because minor disputes are within the exclusive jurisdiction of the Railway Adjustment Board, federal courts may issue injunctions against strikes arising out of minor disputes. Brotherhood of Rail Trainmen vs. Chicago River at 353 US 30, 1957. As stated, we therefore enjoin the threatened strike.

While we might like to, we do not condition our injunction against the strike. We recognize that a district court enjoining a strike over a minor dispute retains its traditional equitable powers and may condition that injunction [103] in order to ensure fairness and to protect the jurisdiction of the Adjustment Board over the dispute. Labor Conference, 830 F. 2d at 746-47; Norfolk and Western 833 F. 2d at 705, n.4.

However, we also recognize that this power is limited and that a court generally should not condition an injunction against a strike over a minor dispute on the maintenance of the status quo. See National Railway Labor Conference, 830 F. 2d at 749 and Railway Labor Executives' Association vs. Norfolk and Western Railway, 833 F. 2d 700 at 708, Seventh Circuit, 1987.

Moreover, as we explained earlier in connection with our refusal to enjoin the sale, we believe that a district court lacks the jurisdiction to enjoin a sale already approved by the ICC. Any relief sought by the union to maintain the status quo must come, if at all, from the Seventh Circuit.

As a result, we conclude that the Chicago and North Western's motion for a preliminary injunction against a strike by its railroad unions is granted. Rail labor's motion for a preliminary injunction against the sale is beyond the jurisdiction of the Court and denied. CN&N [*sic*] and [104] rail labor are to proceed with the resolution of this dispute in accordance with Section 3 of the Railway Labor Act.

* * * *

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

August 23, 1988

Before

Hon. HARLINGTON WOOD, JR., *Circuit Judge*

Hon. MICHAEL S. KANNE, *Circuit Judge*

Hon. JESSE E. ESCHBACH, *Senior Circuit Judge*

No. 88-1504

CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY,
FRVR CORPORATION and
INTERSTATE COMMERCE COMMISSION,
Plaintiffs-Appellees,

vs.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

No. 88 C 444—PAUL E. PLUNKETT, Judge

JUDGMENT—ORAL ARGUMENT

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion on this Court filed this date.

APPENDIX D

Statutes Relied Upon

I. Railway Labor Act, 45 U.S.C. § 151, *et seq.* (Excerpts)

A. Section 2 First

45 U.S.C. § 152 First

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

B. Section 2 Seventh

45 U.S.C. § 152 Seventh

No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

C. Section 3

45 U.S.C. § 153

First. There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

(a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as

have been or may be organized in accordance with the provisions of section 2 of this Act.

(b) The carriers, acting each through its boards of directors or its receiver or receivers, trustee or trustees or through an officer or officers designated for that purpose by such board, trustee or trustees or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the divison on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filed by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fails to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after the passage of this Act, in case of any original appointment to office of a member of the Adjustment Board, or in case of a va-

cancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appontment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 2 hereof and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the

Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers, that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be selected and designated by the labor organizations, national in scope and organized in accordance with section 2 hereof and which represent employees in engine, train, yard, or hostling service; Provided, however, That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the First Division: Provided further, however, That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in the adoption of any award with respect to any dispute submitted to the First Division.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers,

car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth Division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party

to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: Provided, however, That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of

the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the divison of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: Provided, however, That such order may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in the United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the pro-

ceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after the approval of this Act and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: Provided, however, That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this Act, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this Act and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for

such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph *(l)* hereof, with respect to a division of the Adjustment Board.

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been

pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of

the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day, named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

C. Section 6

45 U.S.C. § 156

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being

held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

II. Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.* (Excerpts)

A. Section 2

29 U.S.C. § 102

In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that we have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the

following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

B. Section 8

29 U.S.C. § 108

No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

APPENDIX E

Railway Labor Executives' Association
Member Organizations

*American Railway & Airway Supervisors Association (Division of TCU);

*American Train Dispatchers Association;

*Brotherhood of Locomotive Engineers;

*Brotherhood of Maintenance of Way Employes;

*Brotherhood of Railroad Signalmen;

*Brotherhood Railway Carmen (Division of TCU);

*Hotel Employees and Restaurant Employees International Union;

*International Association of Machinists and Aerospace Workers;

*International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers;

*International Brotherhood of Electrical Workers;

*International Brotherhood of Firemen & Oilers;

International Longshoremen's Association;

National Marine Engineers' Beneficial Association;

*Railroad Yardmasters of America (Division of UTU);

Seafarers International Union of North America;

*Sheet Metal Workers' International Association;

Transport Workers Union of America;

*Transportation•Communications Union (TCU); and

*United Transportation Union.

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* Those RLEA member organizations which represent employees on respondent C&NW and are individual petitioners herein are designated by asterisks.

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No. 88-464

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

CARL V. LYON
FRVR Corporation
1101 30th Street, N.W.
Washington, D.C. 20007
(202) 338-9022

STEPHEN M. OLSON
KIRKPATRICK & LOCKHART
1500 Oliver Building
Pittsburgh, Pennsylvania 15222
(412) 355-6500

JOHN M. NANNES
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
1440 New York Avenue
Washington, D.C. 20005
(202) 371-7000
Attorneys for FRVR Corporation

October 17, 1988

RALPH J. MOORE, JR.*
RICHARD M. WYNER
D. EUGENIA LANGAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

JAMES P. DALEY
STUART F. GASSNER
Chicago & North Western Transportation Company
One North Western Center
Chicago, Illinois 60606
(312) 559-6100
Attorneys for Chicago & North Western Transportation Company

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Do federal courts have jurisdiction under the Railway Labor Act to determine that carrier actions challenged by rail labor as departures from the "status quo" are not authorized under existing labor agreements, even though the Act commits all disputes over the interpretation or application of labor agreements to mandatory arbitration by adjustment boards, whose jurisdiction over such disputes is exclusive?

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IN THE

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TRANSPORTATION COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents Chicago & North Western Transportation Company ("C&NW") and FRVR Corporation ("FRVR")[1] respectfully request that the petition for certiorari be denied.

STATEMENT OF THE CASE

Petitioner Railway Labor Executives' Association ("RLEA") seeks review of the question whether federal

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[1] Respondents' Statement under Rule 28.1 appears as Appendix 1 to Respondents' Opposition to Petitioner's Emergency Motion for a Stay of the Strike Injunction or for An Injunction to Prohibit the Line Sale Pending Petition for A Writ of Certiorari, filed September 21, 1988.

courts have jurisdiction under the Railway Labor Act ("RLA") to determine the merits of a dispute as to whether a carrier's actions challenged by rail labor as alleged departures from the "status quo" are in fact authorized under existing collective bargaining agreements, even though § 3 of the RLA commits all "minor" disputes over the "interpretation or application" of collective bargaining agreements to mandatory arbitration.[2] (Petition for Certiorari ["Pet."] at i). RLEA and its member unions, by a strike threat and an action for a "status quo" injunction under the RLA, challenge C&NW's right to abolish jobs on certain rail lines that it plans to cease operating and to sell to FRVR. RLEA contends that the abolishments are not authorized by the existing labor agreements and thus will change the status quo in working conditions on the C&NW and give rise to a "major dispute" under §§ 2 Seventh and 6 of the RLA.[3] C&NW contends that it *does* have the right to implement the abolishments under existing agreements, and that RLEA's contrary claim gives rise to a minor dispute as to the proper "interpretation or application" of the agreements.

The court of appeals, analyzing the particular agreements in this case under a standard unanimously accepted by all ten courts of appeals that have considered the question, found that C&NW's position is at least "ar-

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[2] 45 U.S.C. § 153 First (i); see *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 723-25 (1945).

[3] "Major" disputes concern intended changes in collective bargaining agreements. *Elgin, supra*, 325 U.S. at 723. They arise under § 2 Seventh, 45 U.S.C. § 152 Seventh, when a carrier attempts a unilateral change in "the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements," or under § 6, 45 U.S.C. § 156, when either party serves a formal notice seeking negotiations over "an intended change in agreements." While a major dispute is pending the "rates of pay, rules, and working conditions" must be maintained unchanged until the parties have exhausted the RLA's negotiation and mediation procedures. *Shore Line* v. *Transportation Union*, 396 U.S. 142 (1969).

guable" and not "obviously insubstantial" and that the question whether the abolishments will change the status quo thus depends on the correct "interpretation or application" of those agreements. The court therefore held that the case raised only an arbitrable minor dispute over which strikes are illegal and enjoinable.[4] RLEA now seeks review of that unexceptional application of firmly-settled law to the particular facts in this case. The decision below does not present any question of the relationship between the RLA and the Interstate Commerce Act.

The case concerns the effects on C&NW employees of the proposed sale to FRVR by C&NW of the "Duck Creek South" lines, 208 miles of track in Wisconsin, out of nearly 7,000 miles of railroad operated by C&NW. Consummation of the sale was originally scheduled for March 1988, and C&NW anticipated that it would abolish approximately 329 C&NW jobs on the line upon consummation. Virtually all the affected employees would continue to be able to hold railroad jobs, however, because FRVR agreed to give them a right of first hire to the approximately 200 jobs it will have on the line, and C&NW had nearly 200 vacant positions elsewhere that these employees could also fill. (Supp. App. at 120-21, 2; Affidavit of Stephen P. Selby, p. 2; Pet. at 5.)[5]

C&NW's existing labor agreements contain force-reduction provisions and seniority rules that apply to the proposed job abolishments. Under these agreements, C&NW is required to give advance notice, the length of which depends on the craft affected, before abolishing jobs, and to allow employees displaced by job abolishments to move to other C&NW jobs that their seniority

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[4] *Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30 (1957).

[5] "Supp. App." citations refer to C&NW's Supplemental Appendix before the Seventh Circuit. The affidavits cited in this Brief were filed in the Northern District of Illinois in support of C&NW's motion for a preliminary injunction against RLEA's threatened strike over the proposed job abolishments.

entitles them to hold. If the C&NW complies with these requirements, it is free to abolish jobs for any reason whatever, without restriction. (Supp. App. at 1, 2, 11-36).

C&NW has exercised its rights under its force-reduction agreements repeatedly over the past 20 years. During that period it has nearly halved the number of miles of track it operates, primarily through line abandonments, and has abolished all C&NW jobs along the lines it has ceased to operate. (Pet. at 3). Since 1981, it has reduced its work force by 41 percent, abolishing nearly 6,000 jobs in conjunction with the discontinuance of operation of lines and numerous other measures increasing productivity.[6] Most of those were union jobs, and in each such instance C&NW effected the job abolishments under the force-reduction provisions of its agreements, without prior RLA bargaining with its unions. No union ever challenged C&NW's right to do so until 1986. (Supp. App. at 3, 86-87, 103-105, 121).

When C&NW advised its unions of the proposed Duck Creek South sale in late 1987, the unions responded by serving notices, ostensibly under § 6 of the RLA, seeking to lengthen the notice requirements, modify application of the seniority rules, and add to allowances and other protective arrangements under the parties' existing agreements for employees affected by the sale to FRVR. Although C&NW took the position that under the Interstate Commerce Act the union notices were not mandatorily bargainable,[7] it engaged in voluntary negotiations

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[6] This shrinkage in employment is characteristic of the railroad industry generally, in which employment has declined by 52 percent since 1970. United States Dep't of Commerce, Bureau of the Census, *Statistical Abstract of the United States 1988* at 570, Table No. 978 (1988).

[7] The sale was subject to approval by the Interstate Commerce Commission, which also has jurisdiction to prescribe and impose

with the unions without prejudice to its position as to the validity of the notices. In January 1988, in an attempt to end the dispute, C&NW offered $30,000 in separation pay to any employee who is unable to continue to hold a railroad job, either with FRVR or C&NW, as a result of the sale. RLEA rejected that offer, however, and negotiations continue.[8] (Supp. App. at 7-10, 112, 118-19.)

In December 1987, FRVR and C&NW obtained authority from the Interstate Commerce Commission to consummate the Duck Creek South sale under the Interstate Commerce Act and the 7-day notice provision of *Ex Parte No. 392, Class Exemption for the Acquisition & Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985), *aff'd mem. sub nom. Illinois Commerce Comm'n* v. *ICC*, 817 F.2d 145 (D.C. Cir. 1987).[9] RLEA then threatened to strike, claiming that the job abolishments would constitute a change in the "status quo," although the unions have not exhausted major dispute procedures with respect to their proposals to change

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protective benefits for employees affected by the sale. 49 U.S.C. § 10901. C&NW takes the position that the Interstate Commerce Act supersedes any obligation that the carrier would otherwise have under the Railway Labor Act to bargain over the effects of the sale on employees. That question is not presented in this case.

[8] C&NW recently invoked the services of the National Mediation Board under § 5 First of the Railway Labor Act, 45 U.S.C. § 155 First, with respect to the dispute over the union notices, again without prejudice to its position that bargaining over those notices is not mandatory. See Supplemental Brief of Petitioners at 6-7.

[9] See *FRVR Corp.—Exemption—Acquisition & Operation—Certain Lines of Chicago & N.W. Transp. Co.*, ICC Finance Docket No. 31205 (served Jan. 29, 1988), *appeal pending sub nom. RLEA* v. *ICC*, No. 88-1280 (8th Cir.), reproduced as Appendix A to this Brief.

the existing rules.[10] C&NW sought a preliminary injunction against the strike in the Northern District of Illinois, and RLEA moved to enjoin the job abolishments.[11]

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[10] Those procedures have been summarized by this Court as follows:

> "The Act provides a detailed framework to facilitate the voluntary settlement of major disputes. A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens 'substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President,' who may create an emergency board to investigate and report on the dispute. § 10. While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo*. §§ 2 Seventh, 5 First, 6, 10." *Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 378 (1969).

[11] The cross-motions were filed in an action already on file in which C&NW sought declaratory relief with respect to the parties' controversy, and in which RLEA had counterclaimed with respect to its status quo contentions.

RLEA's motion sought "an order directing the North Western to maintain the status quo * * *." (Defendants-Counterplaintiffs' Cross-Motion for Preliminary Injunctive Relief at 1). It explained in its moving papers that the alleged departure from the status quo it sought to enjoin was C&NW's plan to "eliminate work", *i.e.* abolish jobs, on the Duck Creek South lines. (Defendants' Reply to Plaintiffs' Opposition to its Motion for Preliminary Injunctive Relief, at 9). C&NW's decision to sell the lines, as RLEA conceded, is a matter of managerial prerogative under the Court's decision in *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981), but RLEA contended that C&NW was obliged to bargain with the unions before taking any action that would affect employees. (Defendants' Memorandum of Points and Authorities In Support of their Cross-Motion for Preliminary Injunctive Relief, at 10). The

In support of its motion, and as a defense to C&NW's motion to enjoin the strike, RLEA claimed that the proposed abolishments under the force-reduction agreements would be a unilateral change by C&NW in the status quo in violation of RLA major dispute provisions, §§ 2 Seventh and 6.[12] Under those provisions, carriers cannot make changes in working conditions, except as authorized under existing agreements, without first exhausting the "long and drawn out," "almost interminable" RLA major dispute procedures.[13] As RLEA conceded below, however, carriers remain free to exercise existing contractual rights pending exhaustion of major dispute procedures.[14]

C&NW responded that it has the right under its existing agreements and past practices to abolish the jobs, that its established right to do so is part of the "status quo," and that a carrier does not lose its contract rights simply because a union serves a notice proposing to change the contracts. Therefore, C&NW contended, RLEA's claim that the proposed job abolishments would change the "status quo" challenges the carrier's right to abolish the jobs under its existing agreements, and any such challenge necessarily raises a dispute over the "in-

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"effects" RLEA identified—elimination of work opportunities on Duck Creek South lines and the resulting contraction of employees' seniority options—all derive from the proposed job abolishments.

[12] 45 U.S.C. §§ 152 Seventh and 156.

[13] *Railway Clerks* v. *Florida E.C.R. Co.*, 384 U.S. 238, 246 (1966); *Shore Line, supra*, 396 U.S. at 149, 153-54.

[14] Pet. at 13a. RLEA conceded that under existing agreements C&NW has "the right * * * to abolish jobs when the work to be performed by those positions is no longer there" and that "unless appellee C&NW and rail labor reach an agreement to modify existing seniority provisions in the current agreements, those provisions will govern the continued employment rights of the affected employees" in the Duck Creek South sale. (Brief for Appellants Railway Labor Executives' Association, *et al.*, before the Seventh Circuit, at 32-33).

terpretation or application" of the agreements, *i.e.*, a "minor dispute" subject to § 3 of the RLA.[15] Under § 3, RLA arbitration boards, not courts, have exclusive jurisdiction to determine disputes over the "interpretation or application" of agreements, 45 U.S.C. § 153 First (i), and strikes over such disputes are unlawful and enjoinable.[16] The district court agreed with C&NW; it granted a preliminary injunction against the threatened strike and denied the injunction sought by RLEA against the proposed job abolishments.[17] (Pet. at 26a-28a).

The Seventh Circuit affirmed, relying solely on the RLA, and found it unnecessary to "resolve the additional issues, raised by the district court's opinion and addressed in the arguments of the parties, with regard to the effect of the Interstate Commerce Act" on the parties' rights. (Pet. at 21a). The court of appeals acknowledged that the unions had served so-called § 6 notices seeking to negotiate new labor agreements governing job abolishments in connection with the Duck Creek South sale, and that under § 6 the court "may enjoin both the rail carrier and the union(s) from altering the status quo during the course of the negotiations and other impasse resolu-

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[15] See *Elgin, supra*, 325 U.S. at 723-28.

[16] See *Trainmen* v. *Chicago R. & I. R. Co., supra*, holding that strikes over minor disputes are unlawful because they are incompatible with the dispute resolution procedure prescribed by Congress and are enjoinable notwithstanding the Norris-LaGuardia Act. 353 U.S. at 42.

On March 4, 1988, C&NW submitted the dispute to the National Railroad Adjustment Board under § 3 of the RLA, seeking arbitration of, *inter alia*, the question whether the carrier has the right under its existing agreements and its past practices thereunder to abolish the Duck Creek South jobs. (Supp. App. at 84).

[17] The district court also accepted C&NW's alternative argument that the injunction RLEA sought would violate the Hobbs Administrative Orders Review Act, 28 U.S.C. § 2342, since the ICC's order, reviewable only in the courts of appeals, had authorized the sale without additional labor protection.

tion procedures * * *." (*Id.* at 4a, 12a, 19a). The court noted, however, that, as RLEA had conceded, C&NW's existing agreements, "unless changed, will continue to govern the employment-related rights of the current C&NW employees who will be affected by the Duck Creek South line sale." (*Id.* at 13a). Therefore, the court had only to decide whether the proposed abolishments would be a "departure" from existing agreements. (*Id.* at 9a). Under well-established principles, a dispute over proposed action by a rail carrier is deemed to be minor so long as the challenged action is "arguably comprehended" by the agreements, express or implied; *i.e.*, "the dispute is minor unless the [railroad's] claims of contractual justification are 'frivolous' or 'obviously insubstantial.'" (*Id.* at 9a, 10a-11a, 16a) (citations omitted).

Applying that firmly-settled standard to C&NW's agreements and its particular history of job abolishments under those agreements, which the court had "carefully evaluated," the court of appeals concluded:

> "There can be no doubt that the agreements and past practice arising thereunder embrace matters of job abolishment, layoff, and reassignment resulting from a layoff with regard to the individuals affected by the Duck Creek South line sale who are able to retain their employment with C&NW. In addition, C&NW's claim that the agreements and attendant past practices extend to the related matters of its obligation to employees who are laid off after their positions are abolished appears to have at least some factual support." (*Id.* at 14a).

Thus, the court of appeals held on the particular facts of this case that RLEA's challenge to the carrier's right to implement job abolishments presented an arbitrable minor dispute. (*Id.* at 14a-16a). The court accordingly held that a strike to prevent those abolishments was unlawful, and that since minor disputes fall within the exclusive jurisdiction of the adjustment boards the dis-

trict court was without jurisdiction to grant the broad "status quo" injunction sought by RLEA under the major dispute provisions of the RLA. (*Id.* at 17a-19a, 20a). The court further stated that under this Court's decision in *Locomotive Engineers* v. *M.-K.-T. R. Co.*, 363 U.S. 528 (1960), the district court could have conditioned the strike injunction on "C&NW's abstention from consummating the Duck Creek South Line sale" if RLEA had demonstrated that employees would otherwise suffer irreparable harm pending proceedings before the adjustment board. The court of appeals held, however, that there was no basis for a claim of irreparable injury to employees here because the adjustment board can "make those employees whole" if it ultimately rules in the unions' favor. (*Id.* at 20a-21a).

On September 2, 1988, RLEA moved the court of appeals for either a stay of the strike injunction or an injunction against the sale pending certiorari, claiming that the case is "related" to other line sale cases before this Court which present questions as to the effect of the Interstate Commerce Act on the application of the RLA. The court of appeals denied the motion, noting that none of the other line sale cases before this Court "involve a claim by the carrier, that its actions in abolishing jobs were permitted under existing labor agreements." The court further determined that C&NW and FRVR "would suffer substantial hardship" if the line sale was delayed because that "could jeopardize" the sale, whereas employees will not be irreparably harmed by the sale.[18]

RLEA then filed a petition for certiorari. On September 21, Justice Stevens stayed the preliminary injunction against the threatened strike. In the face of the renewed strike threat, C&NW and FRVR have postponed consummation of the sale, although each additional day of post-

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[18] The decision of the Seventh Circuit denying the stay is reproduced as Appendix B to this Brief at pages 21a-23a.

ponement threatens the ultimate survival of the Duck Creek South lines.[19]

SUMMARY OF ARGUMENT

When considered on its own merits, this case plainly does not warrant review by this Court. The standard that the court of appeals used to determine that RLEA's challenge to C&NW's right to abolish jobs in connection with the Duck Creek South sale is an arbitrable minor dispute over which strikes are unlawful—*i.e.*, whether C&NW's claim of contractual authorization under its existing labor agreements is at least "arguable"—is accepted by *every* court of appeals that has ever addressed the question, as RLEA concedes (Pet. at 19). RLEA did not challenge that standard below, which is sufficient basis for denying review. In any case, the standard is clearly correct and neither the Act nor applicable decisions of this Court can support any other rule. The standard urged by RLEA would empower the federal courts to determine the merits of disputes over the interpretation or application of labor agreements. Such a result would give unions the option of transferring the forum for resolving such disputes, which number in the thousands each year, from the various adjustment boards to the courts—contrary to what this Court has recognized as the manifest intent of Congress to keep these disputes "out of the courts."[20] This Court should not grant review to decide whether the lower federal courts have repeatedly and unanimously erred for years in identifying minor disputes by a test that is mandated by the RLA and applicable Supreme Court precedent, and has

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[19] The ICC found that "FRVR stands a far better chance of developing a self-sustaining rail operation [on the Duck Creek South lines] than does C&NW," and that unless the lines are sold there is a significant "potential of future abandonment." *FRVR Corp.*, (App. A at 16a).

[20] *Union Pacific R. Co.* v. *Sheehan*, 439 U.S. 89, 94 (1978).

proven workable and acceptable to management and, until now, to labor as well.

RLEA contends, however, that certiorari should be granted in this case primarily because, according to RLEA, it is "inextricably entwined" with three other railroad line sale cases now pending before this Court that present the question whether the Interstate Commerce Act supersedes any obligation that a selling carrier might otherwise have under the RLA to bargain over the effects of a sale on employees. (Pet. at 11). That contention is baseless. The court of appeals in this case expressly declined to reach any Interstate Commerce Act questions, holding instead that, even if the RLA's bargaining procedures were applicable, as RLEA contends in the other pending line sale cases, on the particular facts of *this* case RLEA would still not be entitled to enjoin the Duck Creek South job abolishments or to block them by striking. (Pet. at 20a n.4, 21a). Thus, the issues here are entirely unrelated to and independent of the Interstate Commerce Act question in the other pending cases; the ultimate disposition of the other cases *cannot* affect the ground upon which this case was decided, and vice-versa. This Court can and should, therefore, dispose of the petition in this case without awaiting decisions on the petitions or on the merits of the other cases. That is particularly urgent in view of Justice Stevens's stay of the strike injunction pending consideration of the petition here, which if continued will effectively prevent consummation of the sale and threaten to jeopardize it and the ultimate survival of the Duck Creek South lines.

ARGUMENT

I. THIS CASE DOES NOT WARRANT REVIEW ON ITS OWN MERITS

The decision below rests on an unremarkable application of a fundamental principle of RLA law, and indeed, of federal labor law generally: arbitrators, not courts, have jurisdiction to resolve disputes over the proper interpretation or application of collective bargaining agreements. Such disputes "arise daily," as this Court has recognized,[21] in a variety of ways. Indeed, they commonly arise just as the dispute in this case did: a carrier proposes to take an action affecting employees that it believes is authorized under its existing labor agreements. Rail labor, resisting the change, claims that it is an unauthorized departure from the status quo in working conditions and gives rise to a major dispute, or serves a § 6 notice seeking to change the agreements on which the carrier relies, and either sues for a status quo injunction or threatens to strike to prevent the alleged status quo violation—or both, as RLEA did here. The question presented to the Court in this case is how the lower courts are to treat disputes over the interpretation of collective bargaining agreements when they arise in such status quo cases.

Just last summer, RLEA advised the Court in another case that the "legal standards to be followed" in distinguishing minor disputes from justiciable status quo claims "are well known and the Third Circuit * * * correctly discusse[d] such legal standards" when it said that "[i]f the disputed action of one of the parties can 'arguably' be justified by the existing agreement or, in somewhat different statement, if the contention that the labor contract sanctions the disputed action is not 'obviously insubstantial,' the controversy is [a minor dis-

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[21] *Union Pacific R. Co.* v. *Sheehan*, *supra*, 439 U.S. at 94.

pute] within the exclusive province of the National Railroad Adjustment Board." [22] The court of appeals in this case followed precisely that standard, but having lost below, RLEA now seeks to have the standard itself reviewed by this Court. RLEA never challenged that standard below, and therefore is barred from doing so here.[23] In any case, review of the decision below is unwarranted, because it is clearly correct. Indeed, neither the RLA nor relevant decisions of this Court would permit any other result, and therefore, not surprisingly, there is no conflict among the circuits on the question presented.

A. The Standard Challenged by RLEA Is Plainly Correct

The court of appeals rejected RLEA's claim that C&NW's proposed job abolishments would violate the "status quo" and give rise to a major dispute under either § 2 Seventh or § 6 of the RLA because it found that C&NW had an "arguable" claim that the existing agreements authorize the abolishments, applying the rule that in status quo cases "the federal courts must delineate a matter a minor dispute unless the carrier's claims of contractual justification" are "frivolous or obviously insubstantial * * *." (Pet. at 16a) (citations omitted). That holding was clearly correct.

Section 3 of the RLA gives adjustment boards jurisdiction to resolve disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions * * *." 45 U.S.C. § 153 First (i). This Court has held

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[22] Brief for the Respondents in Opposition at 6, A-9 in *Consolidated Rail Corp.* v. *RLEA*, No. 88-1 (certiorari granted, Oct. 3, 1988).

[23] See, *e.g.*, *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

repeatedly that the adjustment boards' jurisdiction is "exclusive."[24] As the Court has said,

> "Congress endeavored to promote stability in labor-management relations in this important national industry by providing effective and efficient remedies for the resolution of railroad-employee disputes arising out of the interpretation of collective-bargaining agreements. The Adjustment Board was created as a tribunal consisting of workers and management to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions. *Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts.*" *Union Pacific R. Co.* v. *Sheehan, supra*, 439 U.S. at 94 (citations omitted; emphasis added).

The statutory exclusivity of the adjustment boards' jurisdiction compels the standard applied by the court below in determining whether a dispute is minor. Where a carrier's claim that a challenged unilateral action is justified by its labor agreements is at least "arguable," the case plainly turns on a genuine issue as to the proper "interpretation or application" of the agreements. Resolving such questions is the province of the adjustment boards, not the courts. Hence, a court must end its inquiry when it determines that a carrier's claim of contractual justification is arguably correct. To look into the merits of the issue further—to "examine the merits of a rail carrier's reliance on collective bargaining agreements and past practices," as RLEA urges (Pet. at i)—would usurp the boards' jurisdiction.[25]

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[24] *E.g., Andrews* v. *Louisville & N. R. Co.*, 406 U.S. 320, 325 (1972); *Transportation Union* v. *U.P.R. Co.*, 385 U.S. 157, 160, 164 (1966); *Locomotive Engineers* v. *Louisville & N. R. Co.*, 373 U.S. 33, 38 (1963); *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239, 244 (1950).

[25] The "court's role is limited to determining whether [the carrier's] assertion is 'even "arguable."' * * * [I]t is not for it to

Nonetheless, RLEA claims that courts can do just that in status quo cases. That is nothing less than a claim that the courts have concurrent jurisdiction over minor disputes. *Any* carrier action that a union believes is a violation of existing agreements can be challenged as a violation of the status quo under § 2 Seventh, or under § 6 if the union simply serves a § 6 notice proposing to restrict the carrier's rights. That happens in dozens of cases each year now, but under current law the courts are obliged to dismiss any that they deem to present minor disputes. Under RLEA's proposed rule any of the thousands of minor disputes that arise each year in the railroad and airline industries [26]—more than 5,000 each

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weigh, and decide who has the better of the argument. If the court [does] this, it overstep[s] its bounds and usurp[s] the arbitrator's function." *Maine Central R.R.* v. *United Transp. Union*, 787 F.2d 780, 782 (1st Cir. 1986) (citations omitted).

That rule is consistent with this Court's view of the domain of labor arbitrators under the National Labor Relations Act. That Act does not require arbitration, it merely encourages private arbitration agreements for labor disputes. See *Gateway Coal Co.* v. *Mine Workers*, 414 U.S. 368, 377 (1974). Nonetheless, because arbitration under the National Labor Relations Act serves, as under the RLA, as a means for preventing strikes by providing peaceful resolution procedures for labor disputes, the Court has recognized a "presumption of arbitrability": doubts as to whether a particular dispute falls within a private arbitration agreement must be "resolved in favor of coverage." *AT&T Technologies* v. *Communications Workers*, 475 U.S. 643, 650 (1986); *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 582-83 (1960). The exclusive jurisdiction of labor arbitrators under the NLRA extends to all matters "even arguably" within the scope of collective bargaining agreements. *Paperworkers* v. *Misco*, 108 S. Ct. 364, 371 (1987). Hence, "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Id.* Statutory arbitration under the RLA should be entitled to no less judicial deference than voluntary arbitration under the National Labor Relations Act.

[26] Airlines are subject to the RLA and to minor dispute procedures under 45 U.S.C. §§ 181 and 184.

year in the railroad industry alone[27]—could be brought to the federal courts, which would be bound to rule on the merits of these disputes. There would be no principled way to screen out any such disputes from the courts. Labor would thus have an unrestricted option to sidestep arbitration, simply by suing a carrier for an alleged status quo violation, or threatening to strike and raising a status quo defense when the carrier comes to court for a strike injunction, as RLEA did in this case.

That result would be insupportable. It is irreconcilable both with the plain terms of § 3, and with all relevant decisions of this Court, including those cited by RLEA. In addition to numerous holdings that the adjustment boards have "exclusive" jurisdiction over minor disputes,[28] this Court has explicitly held that the Act cannot be read "to mean only that an Adjustment Board has been organized and that the parties are free to make use of its procedures if they wish to; but that there is no compulsion on either side to allow the Board to settle a dispute if an alternative remedy, such as resort to economic duress, seems more desirable." *Chicago R. & I., supra*, 353 U.S. at 34, 39. Rather, arbitration is "compulsory." *Id.* at 39. That holding is squarely in point, and squarely contrary to RLEA's contentions.

So is this Court's decision in *Order of Conductors* v. *Pitney*, 326 U.S. 561 (1946), which RLEA says

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[27] *Appendix to the Budget of the United States Government, FY 1989*, at I-Z66 (1988) (6,610 new railroad arbitrations commenced in 1987); *Appendix to the Budget of the United States Government, FY 1988*, at I-Z64-65 (1987) (5,359 new railroad arbitrations commenced in 1986); *Appendix to the Budget of the United States Government, FY 1987*, at I-Z80 (1986) (8,414 new railroad arbitrations commenced in 1985).

[28] *Andrews* v. *Louisville & N. R. Co., supra*, 406 U.S. at 325; *Transportation Union* v. *U.P.R. Co., supra*, 385 U.S. at 160, 164; *Locomotive Engineers* v. *Louisville & N. R. Co., supra*, 373 U.S. at 38; *Slocum* v. *Delaware, L. & W. R. Co., supra*, 339 U.S. at 244.

merely "touched on" but did not "address the question of the scope of federal court jurisdiction." (Pet. at 22). *Pitney* not only "addressed" that question, it dictates precisely the approach to status quo claims that the Seventh Circuit employed in this case. In *Pitney* a union claimed that a carrier's proposal to displace certain employees from their jobs would be a unilateral change in the status quo in violation of § 6 of the RLA. The carrier's defense "put in issue the meaning of the contracts that allegedly embodied the working conditions which the [carrier was] about to change." 326 U.S. at 565. Thus, the lower court "had to interpret these contracts before it could find that § 6 had been violated." *Id.* But, the Court noted, Congress established the adjustment boards to interpret labor contracts, and "it also intended to leave a minimum responsibility to the courts." *Id.* at 566. This Court thus held that only "after the Adjustment Board acts, but not until then," could the lower court proceed to consider the union's status quo claim. *Id.* at 565-67.

This Court's decision in *Shore Line*, *supra*, on which RLEA relies, supports the same conclusion. To be sure, as RLEA points out, *Shore Line* held that the status quo that must be maintained while a § 6 notice is pending is not *limited* to existing agreements, but rather encompasses "the actual, objective working conditions out of which the dispute arose, irrespective of whether these conditions are covered in an existing [written] agreement." 396 U.S. at 143. But *Shore Line* did not hold, as RLEA now asserts, despite its own concessions below (Pet. at 13a), that the status quo does not *include* the carrier's rights under existing agreements, and that a union can defeat a carrier's established contractual rights simply by *proposing* to change them. On the contrary, *Shore Line* explicitly recognized that if the carrier had an established right to make the changes that the union challenged, that right would be "in reality a part of the actual working conditions" and the carrier would have

been free to make the changes during the § 6 status quo period. 396 U.S. at 153-54. The carrier claimed no such right under its written or implied agreements with the union in that case, and so the Court had no occasion to employ the "major-minor" classification—but it hardly rejected it, as RLEA claims. Instead, the Court explicitly reaffirmed the holding of *Pitney* that, where such a right is claimed, "the proper forum for interpreting the agreements [is] the Adjustment Board provided by Congress in the Railway Labor Act," not a federal court. *Id.* at 156-57.

In sum, the decision below is clearly correct. The result sought by RLEA would impose an intolerable burden on the federal courts, by substituting concurrent federal court jurisdiction for the adjustment boards' exclusive jurisdiction over thousands of minor disputes that arise each year. Reversal of the rule applied below would be irreconcilable with every relevant decision of this Court and the plain language of the Act.

B. There Is No Conflict Among The Circuits

Given the alternatives just outlined, it is not surprising that there is no conflict among the circuits on the standard for determining whether a claim that a carrier has violated the status quo gives rise to a major or minor dispute. The standard employed by the court below for assessing status quo claims, which turns on whether the carrier has an "arguable" contractual justification for its actions, is accepted by every court of appeals that has considered the question, in at least 50 cases, besides this one, in ten different circuits.[29]

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[29] Appendix C to this Opposition (at 24a-28a) sets forth the citations to these cases. There are *no* contrary decisions, although the courts occasionally employ different phrases in formulating the standard. As the Eighth Circuit recently remarked:

> "This Court has said that a dispute is minor if the agreement is 'reasonably susceptible' of the interpretations sought by both

To be sure, other courts have held, on different facts, that job abolishments on other carriers gave rise to major disputes. But contrary to RLEA's claims (Pet. at 25-26), that does not create any conflict among the circuits on the law. Whether a dispute is major or minor depends on the particular facts and the nature of the agreements between the parties in each case. Different facts yield different results in different cases.[30] In cases presenting

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the employer and the employees. Other courts have said that a dispute is minor if the employer's action can be arguably justified under the terms of the existing agreement * * *, or that the dispute is minor unless the employer's argument that its actions are within the contract is 'obviously insubstantial.' These locutions are essentially the same in their result." *Brotherhood of Maintenance of Way Employees* v. *Burlington Northern R.R.*, 802 F.2d 1016, 1022 (8th Cir. 1986) (citations omitted).

The courts of appeals also agree that under *Shore Line*, the status quo includes the carrier's established rights under existing agreements. *Baker* v. *United Transp. Union*, 455 F.2d 149, 157 (3d Cir. 1971) (To "freeze physical conditions in existence on the day [a] Section 6 notice was filed," depriving a carrier of a contractual right to make changes, would not be the "status quo"; it "would be the creation of a new condition."). Accord, *RLEA* v. *Boston & Maine Corp.*, 808 F.2d 150, 156 (1st Cir. 1986); *United Transp. Union* v. *St. Paul Union Depot*, 434 F.2d 220, 223 (8th Cir. 1970). See also *Rutland Ry.* v. *Brotherhood of Loc. Engineers*, 307 F.2d 21, 33-36 (2d Cir. 1962); *REA Express* v. *Brotherhood of Ry., Airline & S.S. Clerks*, 459 F.2d 226, 230-32 (5th Cir. 1972).

[30] All of the cases that RLEA claims are in direct conflict with the decision below are factually quite different from this one. In *Telegraphers* v. *Chicago & N.W. R. Co.*, 362 U.S. 330 (1960), as RLEA concedes, the carrier "did not argue * * * that the reduction in force provisions of its collective bargaining agreements with the Telegraphers authorized it to abolish jobs." (Pet. at 24). This Court, in fact, found it "impossible" to say that the case turned on conflicting "interpretations of the provisions of" an "existing collective bargaining agreement." 362 U.S. at 341. The same is true of *RLEA* v. *Pittsburgh & Lake Erie R.R.*, 845 F.2d 420 (3d Cir. 1988), *petitions for certiorari pending*, Nos. 87-1888 & 88-217. The carrier there did not contend that its agreements authorized the

facts similar to this one, the disputes have been deemed minor. For example, a recent District of Columbia Circuit opinion held that broad force-reduction provisions similar to those in C&NW's agreements and a past practice of unilateral job abolishments similar to C&NW's arguably justified a carrier's plan to abolish the jobs of over 3,000 employees in connection with its discontinuance of service on certain routes, and thus that a union challenge to those abolishments was a minor dispute. *Air Line Pilots Ass'n* v. *Eastern Air Lines*, Nos. 88-7201-7204 (D.C. Cir. Sept. 30, 1988). Similarly, in another rail line sale case where the selling carrier had force-reduction agreements virtually identical to C&NW's, the court held that the unions' challenge was a minor dispute and thus enjoined a threatened strike and refused to enjoin the sale. *Decker* v. *CSX Transp. Inc.*, 688 F. Supp. 98 (W.D.N.Y. 1988), *appeal pending sub nom.*

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abolishments. In *United Industrial Workers* v. *Galveston Wharves*, 351 F.2d 183 (5th Cir. 1965), the carrier did raise such a claim and the Fifth Circuit said, like the Seventh Circuit did in this case, that "if by its terms o[r] reasonable implication therefrom, the collective agreement apparently affords some arguable basis" for the carrier's action, the dispute "is not a § 6 situation and remains a minor dispute." *Id.* at 188. On the particular facts of that case, however, the court concluded that the carrier's actions there could not "even remotely be justified" under the agreement. *Id.* at 189. The Seventh Circuit held otherwise on the basis of the quite different facts here, employing the same legal standard as the Fifth Circuit.

Contrary to RLEA's assertion (Pet. at 27), the Eighth Circuit's decision in *Burlington Northern R.R.* v. *United Transp. Union*, 848 F.2d 856 (8th Cir. 1988), did not hold that the carrier's decision to dispose of a part of its line and abolish jobs gave rise to a major dispute. Quite the opposite: The Eighth Circuit held that the Interstate Commerce Act "supersedes the authority of the mandatory bargaining provisions of the RLA * * *." *Id.* at 862. The carrier's force-reduction agreements were not before the court.

CSX Transp., Inc. v. *United Transp. Union*, No. 88-7461 (2d Cir.).[31]

The point is that there is no conflict or dispute about the governing legal standard. *All* the decided court of appeals cases agree with the Seventh Circuit that a status quo claim gives rise only to a minor dispute if the carrier's contractual justification is at least "arguable," or not "frivolous" or "obviously insubstantial." (Pet. at 11a, 16a). As RLEA concedes, that has been settled law for at least "the past four decades." (Pet. at 19).

II. THIS CASE DOES NOT MERIT REVIEW SIMPLY BECAUSE OTHER LINE SALE CASES ARE PENDING BEFORE THE COURT

A. This Case Is Legally and Factually Unrelated To the Other Pending Cases

As we have just shown, this case, standing alone, could not possibly be deemed to merit review by this Court. Indeed, RLEA's primary proffered "reason for granting the writ" has nothing to do with the merits of this case. Rather, RLEA contends that certiorari should be granted because this case is supposedly "inextricably entwined" with three other railroad line sale cases now pending before the Court on petitions for certiorari, Nos. 88-217 and 87-1888, seeking review of *RLEA* v. *Pittsburgh & Lake Erie R.R.*, 845 F.2d 420 (3d Cir. 1988), and No. 87-2049, seeking review of *RLEA* v. *Chicago & N.W. Transp. Co.*, 848 F.2d 102 (8th Cir. 1988). (Pet. at 11). The petitions for certiorari in those cases present, as RLEA has said, the question of "the relationship of the Railway Labor Act to the transportation statute." (Stay

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[31] In *Decker*, the Second Circuit initially granted a stay similar to Justice Stevens's stay here, pending appeal of the district court's judgment, but when it heard oral arguments on the merits on July 18, 1988 it vacated the stay that same day.

Application at 10). Specifically, they present a conflict among the circuits over the question whether RLEA is free to seek additional labor protection in line sales through RLA collective bargaining, or whether the RLA is superseded in that regard by the Interstate Commerce Act's provision for the ICC to resolve labor protection disputes in line sales. (See Pet. at 13, 15).

In this case, by contrast, the court of appeals expressly declined to reach the Interstate Commerce Act "supersession" question, because the "Railway Labor Act and the attendant relevant case law provide[d] a full and proper basis for affirming the district court." (Pet. at 21a & n.6, 20a n.4). Indeed, RLEA itself is bound to concede that this case "differs" from the other cases because it was decided on an "alternative argument." (Pet. at 14; Stay Application at 11). The legal issues in this case are thus wholly independent of those presented in the other pending line sale cases.[32] The ultimate decision in this case will have no bearing on the merits of those cases, and the decisions in those cases will not affect the merits or outcome of this case.

RLEA contends, however, that the concededly "different" issues in this case must "for logical and practical reasons, be determined before this Court considers whether the Interstate Commerce Act supersedes the Railway Labor Act," because "the controversy over rail labor's bargaining rights" in line sales will not be put to rest "so long as some courts are holding that those rights are not implicated in such sales" even if the RLA is not superseded. (Pet. at 11, 14-15). That contention is specious. The court of appeals in this case did *not* hold that RLEA had no RLA "bargaining rights" with respect to labor protection in the Duck Creek South sale. Indeed, while the court of appeals noted that the unions had served

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[32] Neither the "Questions Presented" nor the "Statutes Involved" sections of RLEA's petition so much as mentions the Interstate Commerce Act.

§ 6 notices seeking to negotiate for labor protection, it had no occasion to address the validity of those notices and did not do so.[33] (Pet. at 4a, 12a). In any case, the scope of an employer's bargaining obligation in connection with sales of parts of its business is settled by this Court's decision in *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981), which held that the effects of such sales on employees are bargainable, while the sales themselves are not. RLEA never argued that C&NW's obligation under the RLA would be any broader, and C&NW never contended that it would be any narrower, if the RLA's major dispute procedures were not superseded by the Interstate Commerce Act. No question as to the scope of either RLEA's bargaining rights or C&NW's bargaining obligations under the RLA was before, or decided by, the court of appeals.

The only question that the court of appeals addressed was the scope of the "status quo" pending bargaining, given C&NW's claim that the force-reduction provisions in existing agreements authorize the abolishments, and RLEA's concession that those "contractual provisions, unless changed, will continue to govern" the sale's effects on employees. (Pet. at 13a). The court's holding on that question has no relevance to the other pending line sale cases before the Court. As the Seventh Circuit pointed out, neither the Third nor the Eighth Circuits addressed the minor dispute question that RLEA seeks to have this Court review in this case.[34] (App. B at 22a). Thus, this

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[33] Moreover, as RLEA concedes, C&NW was bargaining over labor protection, even though it did not believe it was obliged to do so, before the court of appeals ruled, and has continued to bargain since the court ruled; indeed, it was C&NW that asked the National Mediation Board last month to mediate the parties' labor protection dispute under § 5 of the RLA. See n.8 *supra*.

[34] The carrier in the *Pittsburgh & Lake Erie* case did not contend that its labor agreements authorized it to abolish jobs in connection with the sale there. C&NW did raise such a claim as an alternative defense to RLEA's attempt to procure a status quo injunction in

Court's disposition of those cases will not have any "practical" effect on the result in this case, and the result in this case will not affect this Court's disposition of those cases. Whether or not rail labor is entitled to bargain for new labor protection agreements in line sales, some carriers, like the C&NW, may already have a right under existing agreements to abolish jobs in connection with sales, and others may not. But that fact has no bearing at all on the legal question whether the Interstate Commerce Act relieves all carriers of any obligation to bargain over future labor protection agreements for such sales, and carriers whose labor agreements differ from C&NW's will still be confronted with that question even though C&NW's particular agreements allowed the Seventh Circuit to avoid it in this case. There is, thus, no relationship, legal or practical, between this case and the other pending line sale cases.[35]

B. The Petition Should Be Disposed of Promptly, Not Held In Abeyance Pending Decisions In the Other Unrelated Line Sale Cases

Because this case is unrelated to the other pending cases, there is no reason for the Court to postpone disposition of the petition for certiorari pending disposition of the other cases. Doing so would threaten irreparable harm

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the Eighth Circuit case, but neither the district court nor the Eighth Circuit reached the minor dispute argument because both disposed of the case on Interstate Commerce Act grounds.

[35] The Seventh Circuit's reliance on RLA minor dispute procedures would not be affected if this Court should hold that the major dispute procedures are superseded by the Interstate Commerce Act. The major dispute procedures conflict with the Interstate Commerce Act because they would authorize coercive bargaining and strikes over claims for future labor protection, while Congress has committed labor protection disputes in lines sales to peaceable resolution by the ICC. The minor dispute procedures, which provide peaceable means for resolving disputes over contract rights established prior to a line sale, raise no such conflict.

to C&NW and FRVR. So long as the stay of the strike injunction remains in effect, C&NW and FRVR cannot risk consummation of the sale. As the court of appeals found, "further delay could jeopardize the proposed sale." (App. B at 23a). That would threaten harm not only to C&NW and FRVR, but also to the long term viability of the Duck Creek South lines.

The ICC found last January that "FRVR stands a far better chance of developing a self-sustaining rail operation [on the Duck Creek South lines] than does C&NW," and that unless the lines are sold there is a significant "potential of future abandonment." (App. A at 16a). That conclusion was based in part on FRVR's ability to attract shippers for whose business C&NW has been unable to compete successfully. (*Id.* at 6a-7a). In late 1987, however, another regional railroad, the Wisconsin Central, commenced operations on former lines of the Soo Line Railroad parallel to the Duck Creek South lines. (*Id.*; see Affidavit of Dick Neu and his attached Verified Statement before the ICC at p. 5). While the Duck Creek South sale has been deferred pending this litigation, Wisconsin Central has had a substantial head start in seeking to enter into transportation contracts with shippers that FRVR hoped to serve. Each additional day of delay of the sale thus threatens erosion of FRVR's projected customer base, and ultimately threatens prospects for a viable railroad operation on the Duck Creek South route. The Court should therefore rule on the petition now, without awaiting results in the other, wholly independent and wholly different, cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

CARL V. LYON
FRVR Corporation
1101 30th Street, N.W.
Washington, D.C. 20007
(202) 338-9022

STEPHEN M. OLSON
KIRKPATRICK & LOCKHART
1500 Oliver Building
Pittsburgh, Pennsylvania 15222
(412) 355-6500

JOHN M. NANNES
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
1440 New York Avenue
Washington, D.C. 20005
(202) 371-7000
Attorneys for FRVR Corporation

October 17, 1988

RALPH J. MOORE, JR.*
RICHARD M. WYNER
D. EUGENIA LANGAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

JAMES P. DALEY
STUART F. GASSNER
Chicago & North Western Transportation Company
One North Western Center
Chicago, Illinois 60606
(312) 559-6100
Attorneys for Chicago & North Western Transportation Company

* Counsel of Record

APPENDICES

APPENDIX A

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 31205

FRVR CORPORATION—EXEMPTION ACQUISITION AND OPERATION—CERTAIN LINES OF CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY—PETITION FOR CLARIFICATION

Decided: January 28, 1988

This decision is issued in response to a petition filed by the Chicago and North Western Transportation Company (CNW) and FRVR Corporation. FRVR is a new corporation formed for the purpose of acquiring and operating certain rail lines of the CNW. Petitioners seek a statement of this agency's views as to our jurisdiction over labor issues arising out of the formation of short-line railroads. The matter has become controversial in the past several years, due to the acceleration in the creation of regional and short-line railroads.

Since partial deregulation under the Staggers Rail Act of 1980 [1] nearly 200 short-line and regional railroads have come into existence—partially reversing the industry's long trend of exit and contraction. These new roads now operate approximately 13 thousand miles of rail lines with 4 thousand workers handling more than 1.3 million carloads yearly.

Up until the Staggers Act, the principal means of exit for large "Class I" railroads from unprofitable markets had been through abandonment. Substantial deregulation

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[1] Pub. L. No. 96-448, 94 Stat. 1941-45.

of motor freight under the 1980 Motor Carrier Act [2] threatened to accelerate this trend through new and increasingly efficient truck competition. Abandonment, by its nature, is most often a painful, disappointing process. It normally entails the permanent loss of jobs and railroad service, even though it has not always occurred in markets that are inherently unserviceable by rail. Markets that produce losses when operated by Class I railroads can produce profits for smaller, more efficient local carriers. These new carriers are potentially beneficial to nearly all concerned. They preserve rail service for the local economies and provide traffic food for the larger carriers, enhancing employment prospects for rail labor—both on the smaller lines and throughout a reinvigorated Class I system—and they foster optimal recognition of the energy efficiencies and environmental benefits of rail service.[3]

The trend away from abandonment and towards the formation of short-line and regional carriers developed in response to the new business environment created by the Staggers Act. This development was given impetus by a change in 1982 in Commission labor protection policy which was in part based upon a provision of the Staggers Act which establishes a branch line sale process in which labor protection was foreclosed by the statute.[4] In the past, the typical sale of a short-line carrier might have been conditioned upon comprehensive (and poten-

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[2] Pub. L .No. 96-296, 94 Stat. 793.

[3] The National Rail Transportation Policy charges the Commission with the responsibility of ensuring the development of a sound rail transportation system, while encouraging fair wages and safe and suitable working conditions for labor. The Commission is also to encourage and promote energy conservation. *See* 49 U.S.C. 10101a.

[4] 49 U.S.C. 10905. *See Simmons* v. *ICC*, 760 F.2d 126 (7th Cir. 1985).

tially quite expensive) labor protection.[5] By 1982 the Commission had determined that the expense of labor protection foreclosed short-line development, forcing the less attractive abandonment alternative or an abandonment and sale under the provisions of 49 U.S.C. 10905. As labor protection in short-line sales to new entrants is within the Commission's discretion, the Commission began to withhold protection in individual applications[6] on the three-part theory that (1) in doing so rail service would be preserved, (2) the new railroads provided the best prospect for protecting the employment prospects of the affected labor and (3) it made no sense to force railroads to go through the more cumbersome process of abandonment under 49 U.S.C. 10903 and sale under 49 U.S.C. 10905 to achieve the same result. After consideration of scores of individual applications, the Commission decided in a 1986 notice and comment rulemaking that the development of new small railroads was overwhelmingly beneficial and should be encouraged and allowed to proceed with a minimum of regulatory cost and delay.[7] The Commission issued rules exempting certain classes of line sales from drawn out Commission regulation, retaining for itself the unqualified right to re-

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[5] *See e.g., Durango and Silverton Narrow Gauge Railroad Co.—Acquisition and Operation*, 363 I.C.C. 292 (1979), *aff'd sub nom. Railway Labor Executives' Association* v. *United States*, 697 F.2d 285 (10th Cir. 1983) (Review Board decision noting that imposition of labor protection was discretionary).

[6] *See Knox and Kane Railroad Co.—Gettysburg Railroad Co.—Petition for Exemption*, 366 I.C.C. 439 (1982).

[7] Ex Parte No. 392 (Sub No. 1), *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901, aff'd sub nom. Illinois Commerce Commission* v. *I.C.C.*, 817 F.2d 145 (DC Cir. 1987). This decision is in keeping with the National Transportation Policy of minimizing the need for Federal regulation (49 U.S.C. 10101a(2)), as well as the policies noted in footnote 3 above.

view and correct any unique problems that might arise out of exceptional circumstances.[8]

The Commission's policy has been validated by practical results. New railroad formation quickened,[9] abandonments fell,[10] service was maintained and typically improved, and rail jobs that might otherwise have been lost were preserved.[11] Most observers supported and welcomed

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[8] The Staggers Act expanded the Commission's exemption authority. Further, as is stated in the Conference Report, the Commission is *actively* to pursue exemptions for transportation and is to have a policy of reviewing carrier actions *after the fact* to correct abuses. *See* H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 104-105.

[9]

New Railroad Formation

Year Est.	Number
1982	25
1983	20
1984	31
1985	28
1986	45
1987*	70

* Preliminary figure based on notices filed.

[10]

Miles of Lines Abandoned

Year	Miles
1982	5151
1983	2454
1984	3083
1985	2343
1986	2087
1987	1932

[11] The Commission's Office of Transportation Analysis is engaged in continuing study and research on the effect of the Commission's policy and the short-line/regional phenomenon. This study has included on-site interviews with labor and management, as well as data collection and analysis. This analysis demonstrates that employment on the new lines, particularly the larger regional carriers,

the Commission's policy initiative, but it has been consistently opposed by organized rail labor. Under the rules adopted in 1986, opposition to individual transactions is presented in petitions to revoke the grant of exemption. Such petitions have been filed in approximately 20 of the 120 transactions processed under the 1986 rules. Where petitions to revoke are filed, the Commission evaluates the basis for the revocation request, and has well-defined authority to correct any abuses that are shown.[12] The Commission's authority includes the power to impose labor protective conditions through partial revocation,[13] although under the rules this step will be taken only where exceptional circumstances are shown. The Commission would consider as exceptional, situations in which there was misuse of the Commission's rules or precedent,[14] or where existing contracts specified that line sales were subject to procedural or substantive protection.[15] Further, the exemption will be modified where labor can demonstrate injury that was unique, disproportionate to the gains achieved for the local transport

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is typically drawn from the work force of the selling carrier. Further, while initial employment levels are below those of the departing carrier, employment on some lines has grown over time as improved service attracts new business to the lines.

[12] *See Consolidated Rail Corporation—Declaratory Order—Exemption*, 1 I.C.C.2d 895 (1986), *cited approvingly, G&T Terminal Packaging Co., Inc.* v. *Consolidated Rail Corp.*, CA 84-1173 Slip op. (D.N.J. October 23, 1986). *See also* legislative history of the Staggers Act in footnote 8 above.

[13] *See Maryland Midland Railway, Inc.—Exemption from 49 U.S.C. 11343 and 11301* (not printed), served January 6, 1987.

[14] *Cf.* Order of Investigation, served May 18, 1987, in F.D. No. 30965, *Delaware and Hudson Railway Company—Lease and Trackage Rights Exemption—Springfield Terminal Railway Company.*

[15] It is the Commission's standard labor protection policy in restructuring proceedings to preserve existing employment contracts insofar as possible, consistent with the merger, consolidation or abandonment authorized. *See* section 2 of the standard *New York Dock* conditions, 360 I.C.C. 84 (1979).

system, and which can be compensated without causing termination of the transaction or substantially undoing the prospective benefits of the Commission's existing policy for other communities and locales.[16]

The exemption proposal filed by CNW and FRVR corresponds quite well to our expectations and experience with the use of the Ex Parte 392 (Sub-No. 1) rules. At issue are 208 miles of light density lines in Eastern Wisconsin in the area between Green Bay and Milwaukee. The paper industry is the principal source of traffic and holds the greatest potential for traffic growth on the FRVR line. But to achieve growth means reversing the paper industry's increasing reliance on truck service. A verified statement filed by Petitioners indicates that rail market share of the outbound paper market was 54 percent of the total in 1977, but had fallen to under 20 percent by 1986. The number of motor carriers operating in the region has doubled and price competition is strenuous. The lines of the CNW may now be under additional pressure since its rail competition (which had been the Soo Line operating at relatively standard Class I costs) is a new regional operator, the Wisconsin Central. Wisconsin Central, as organized, has distinct cost advantages that will make long-term competition by CNW almost certainly impossible, absent a substantial improvement in efficiency and productivity.[17]

To work its way out of this predicament, CNW seeks to sell its line to the newly formed FRVR. FRVR has a management team drawn from the Wisconsin area and from within the rail industry, with experience in running a small railroad and marketing rail transportation

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[16] *Cf. Northern Pacific Acquiring Corp. and Eureka Southern Railroad Co.—Exemption* F.D. 30555 (Decision served January 8, 1988).

[17] Two petitions to revoke the Wisconsin Coastal exemption (F.D. No. 31102) are now before the Commission.

to the paper industry. It intends to draw its work force from existing CNW employees where possible, and anticipates that it will operate as a union-represented company.[18] Its wages will be approximately 85 percent of the Class I standard, and its work rules will give it substantial productivity improvement over the CNW operations. The company also anticipates use of an incentive bonus plan to further productivity. It will own its own engines, operate its own facilities, and rely principally on the CNW for car supply. It has trackage rights over CNW to connect into Milwaukee, and it has connections with other roads at points on the system. The company has already contacted shippers along the lines, and it filed 25 shipper letters acknowledging anticipated support and cooperation with its petition.

CNW estimates that the impact of the sale on its employees will be minimized by FRVR's commitment to the use of former CNW employees. For its part, CNW states that it has employment shortages elsewhere on its system, and that it will make these jobs available to workers affected by the FRVR sale. It anticipates that approximately 20 employees might still be left without employment either on FRVR or the CNW. It has offered a commitment of $30,000 per employee as a separation allowance for any employee unable to secure continued employment with either CNW, by exercising seniority, or with FRVR, under the right of first hire.[19] CNW has offered to meet with its unions to discuss this offer and related issues. According to Petitioner, the unions believe that such discussions must proceed under the aus-

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[18] Verified Statement of S. P. Selby. Selby states that CNW employees currently working on the affected lines are granted right of first hire selected in accordance with qualifications, work records, fitness and ability, and physical and medical standards. Selby states further that he has met with an officer of the Railway Labor Executive's Association to work out a suitable arrangement for union representation of future employees. V.S., at 3-4.

[19] Verified statement of Robert Schmiege.

pices of the Railway Labor Act (RLA).[20] Bargaining under the RLA requires maintenance of the status quo, and permits resort to strikes, lockouts or other form of self-help if an impasse cannot be mediated. CNW takes the position that such bargaining gives labor the power to defeat the FRVR transaction, and is not required. However, informal discussions have taken place, but no agreements have been reached.

CNW has petitioned for a declaration as to the Commission's view of its role in resolving any labor disputes which may arise in connection with the implementation of this Commission authorized transaction.[21] CNW asserts such an action is required to ensure a smooth implementation of the authorized transaction.

The Railway Labor Executives' Association (RLEA) has filed in opposition to the Petition of FRVR and CNW. RLEA believes that the Commission is without jurisdiction to issue the clarifying decision requested by Petitioners, and that Petitioners' argument on the merits is based on erroneous legal interpretations.

DISCUSSION AND CONCLUSIONS

The first of RLEA's propositions appears to be based on a misapprehension of the nature of a declaratory order. It seems beyond question that the Commission has the authority to issue declaratory opinions.[22] RLEA does

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[20] 45 U.S.C. 151.

[21] Pursuant to our class exemption rules, 49 CFR 1150.31 *et seq.*, the CNW/FRVR exemption became effective December 30, seven days after filing. Petitioners indicated that they intend to defer consummation until the Commission responds to their petition for clarification. A related petition for exemption of a control relationship between FRVR and its parent corporation has also been filed.

[22] Pursuant to 5 U.S.C. 554(e), an administrative agency is empowered in its discretion to issue declaratory orders to terminate controversy or remove uncertainty.

not directly address this authority, arguing instead that the Interstate Commerce Act (ICA) does not vest this agency with the power "to decide the applicability and scope of other statutes"—that the "Commission is clearly not the tribunal to determine how to resolve conflicting mandates of the ICA and other statutes." That is true enough, if understood to mean that the Commission's opinions on statutory interpretation are, when challenged, subject to judicial review and possible override. There is no dispute over the fact of judicial primacy, but it does not follow that the Commission is foreclosed from expressing its viewpoint, or that such expression may not issue in declaratory form, when related to the discharge of explicit statutory power, such as the power to approve or exempt the sale of a line of railroad. There is no need to deprive private parties and reviewing courts of the benefit of a clear statement of the Commission's viewpoint. The reason for declaratory opinions is to aid in clarifying and resolving controversies.

A part of the present controversy that requires clarification is whether the Railway Labor Act must be accommodated (in RLEA's words, subordinated) to the Interstate Commerce Act in the circumstances of an approved or exempted line sale arising under section 10901 of the ICA. A related issue is the immunity from injunction under the Norris-LaGuardia Act of a strike that threatens to prevent the consummation of a transaction so approved or exempted.

Until quite recently, it had been an established rule that the orders of the Commission approving the merger, sale, or abandonment of a line of railroad were not subject to collateral attack in the courts, and could not be frustrated by employee actions taken under the aegis of the Railway Labor Act or otherwise.[23] "Congress did

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[23] *Brotherhood of Locomotive Engineers* v. *C&NW*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963).

not intend employees have such power to block consolidations which are in the public interest." [24] However, in a recent Third Circuit proceeding, *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Executives' Association*,[25] (*Lake Erie*), it has been held that a district court has no jurisdiction to enjoin a strike taken to block an ICC-approved sale. The Court based this holding on a finding that the Norris-LaGuardia Act need not be accommodated to the Interstate Commerce Act. This decision has had an immediate impact on the formation of small railroads,[26] threatening to halt the revitalization of the marginal railroad sectors—a restructuring that the Commission has found to be in the interest of carriers, labor, and the shipping public.

In its opposition response, RLEA takes the position that the Third Circuit *Lake Erie* decision is correct,[27] and that the Commission should conclude that the Interstate Commerce Act does not supersede the Railway Labor Act or Norris-LaGuardia. RLEA argues that *Brotherhood of R.R. Trainmen* v. *Chicago River and Indiana R.R.*[28] (*Chicago River*) and *Boys Markets Inc.* v.

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[24] *Missouri Pacific Railroad Company* v. *UTU*, 782 F.2d 107 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 3209 (1987).

[25] No. 87-3664, Slip op., October 26, 1987.

[26] The *Lake Erie* decision has been followed by a Missouri federal district court, *Burlington Northern Railroad* v. *U.T.U.*, No. 86-5013, Slip op., October 26, 1987. (Missouri, Western District).

[27] The *Lake Erie* decision left open the issue of whether bargaining under the Railway Labor Act was necessary. The case was remanded to the district court on the RLA issue. The district court held the RLA applicable to the proposed sale and enjoined consummation of the transaction pending compliance with that act, finding that the Interstate Commerce Act does not operate to relieve the parties from their RLA obligations. *Railway Labor Executives' Assoc.* v. *Pittsburgh & Lake Erie Railroad*, No. 87-1745 Memorandum Opinion (Wes Dis. PA., No. 24, 1987). The case is back in the Third Circuit on appeal.

[28] 353 U.S. 30 (1957).

Retail Clerks Union[29] (*Boys Market*)—Supreme Court "accommodation" cases relied on by Petitioners—are not controlling since they do not address the Interstate Commerce Act, but are limited to situations where aspects of national labor statutes were in conflict.[30] Hence, RLEA is in agreement with the *Lake Erie* court that statutory preemption of the Norris-LaGuardia no-injunction principle is limited to the need to accommodate other *labor* statutes. Without conceding its legitimacy, RLEA recognizes certain precedent to the effect that ICC authorization of a transaction under the merger provisions (49 U.S.C. 11343) will automatically relieve a carrier from the necessity of compliance with the Railway Labor Act to the extent necessary to go forward with the approved transaction. However, RLEA argues that this precedent has no relevance to 49 U.S.C. 10901 line sales. Unlike line sales, merger-orders are provided explicit preemption authority in 49 U.S.C. 11341[31] and, as income protection and dispute resolution mechanisms are mandatory in merger proceedings,[32] labor is not "left out in the cold."[33] According to RLEA these are critical distinctions.

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[29] 398 U.S. 235 (1970).

[30] Thus, in *Chicago River* an injunction against a strike was sustained where necessary to protect the Railway Labor Act's requirement that "minor" grievances be submitted to arbitration. In *Boys Markets* the court reached a similar conclusion under the Labor Management Relations Act.

[31] A carrier or corporation participating in a transaction approved or exempted by the Commission under subchapter III of Chapter 113 "is exempt from the antitrust laws and from all other laws . . . as necessary to let that person carry out the transaction . . ." By its terms, this section does not apply to line sales under Chapter 109.

[32] 49 U.S.C. 11347.

[33] RLEA cites to language in *Missouri Pacific R. Co.* v. *United Transportation Union* 782 F.2d 109 (8th Cir. 1986). This case held that a railroad is exempted under ICA Section 11341(a) from the Railway Labor Act in connection with a transaction approved under

The broad issue presented by the CNW-FRVA Petition and the RLEA Opposition reply is whether the Interstate Commerce Act preempts the Railway Labor Act to the extent necessary to allow the parties to consummate a transaction previously authorized by the Commission. Every court that had ruled on this precise issue prior to the *Lake Erie* decision had answered yes.[34] By so doing, courts have recognized the importance of this agency's role in reconciling the conflicts between public need for an efficient transportation system, (including the need for fair and equitable labor relations) and the private disputes that arise invariably from consolidations and restructurings within the rail system. The ICC has inherent powers to impose labor protection where necessary to ensure labor equity,[35] including the power to impose income guarantees and comprehensive schemes for alternative dispute resolution—mechanisms which may include notice, negotiation, a status quo requirement and arbitration. From the 1930's, when the ICC actively became involved in the administration of labor protection, Congress has routinely affirmed and expanded the importance of the Interstate Commerce Act as a part of the complex of laws governing labor relations in the rail

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49 U.S.C. 11343. Labor emphasizes that the court there reasoned that inferring preemption of the RLA was reasonable because mandatory labor protection is applied 782 F.2d, at 112. There are chronological problems with placing such reliance on the reasoning. The preemption provision was first enacted in 1920, mandatory labor protection in 1940.

[34] *See Missouri Pacific R. Co.* v. *United Transportation Union, supra; Brotherhood of Locomotive Engineers* v. *C&NW*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963). *Cf. ICC* v. *Locomotive Engineers*, 55 USLW 4771 (June 9, 1987) (Concurring Opinion of Justice Stevens, joined by Justices Brennan, Marshall and Blackmun).

[35] *United States* v. *Lowden*, 308 U.S. 225 (1939); *ICC* v. *Railway Labor Assn.*, 315 U.S. 373 (1942).

industry. The Transportation Act of 1940 [36] was a legislative affirmation of the Commission's authority to impose labor protection, mandating the use of labor protection in mergers and consolidations.[37] The Railroad Revitalization and Regulatory Reform Act of 1976 [38] mandated labor protection in trackage rights, lease transactions, and abandonments. The Staggers Rail Act of 1980 made labor protection mandatory in connection with the abolition of rate bureaus (Section 219 (g) and feeder line sales—section 401), as well as giving the Commission explicit discretion to impose protective conditions on reciprocal switching and on the construction of new rail lines. For more than fifty years the Commission has exercised its authority in this field, frequently at the request and with the support of labor, and our decisions have had enormous impact on the shape of rail labor relations throughout this period.

It is primarily due to the policy decision to withhold such protections taken in Ex Parte 392 (Sub-No. 1) (and in earlier individual proceedings) that the Commission's authority is under challenge. However, the Commission's policy determinations have been repeatedly sustained, and the existence of our jurisdiction may not hinge on the policy choice made.

In the first place, labor has not been left out in the cold. Affected parties were free to participate in the Ex Parte rulemaking, and are free to petition for its re-

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[36] 54 Stat. 899.

[37] The *Lowden* court, while noting the pendency of the legislation which was to become the 1940 Act, concluded that the legislative initiatives did not militate against the conclusion that the Commission had implied power over labor protection in consolidations, but rather that Congress merely sought to make mandatory what was at the time discretionary. *United States* v. *Lowden, supra,* at 239.

[38] 90 Stat. 31.

opening. Indeed, aspects of the rulemaking are now under reconsideration in a reopened proceeding.[39] Further, in individual cases through the revocation process parties are given the opportunity to show that the policy norms of the Ex Parte rulemaking ought not apply. Full participation before the Commission is an important end in itself as it helps to inform the Commission of the range of problems and circumstances confronting transportation. If current policy does not provide routine protection, it is because experience has demonstrated that the formation of new lines would be thwarted, to the overall public detriment. Where exceptions are needed, the Commission has the authority to fashion a full remedy.

Jurisdiction is not determined by outcome. The Commission has exclusive and plenary jurisdiction over the sale, merger, or abandonment of rail lines.[40] This authority was granted by Congress as a part of a regulatory framework, to ensure a rail transportation system in the public interest. As a necessary component of this regulatory framework, the Commission has had to preempt on occasion the operation of other laws to the limited extent necessary to remove obstacles to Commission approved transactions. Such preemption of labor legislation has been upheld even in circumstances where the Commission did not provide labor protection under its auspices.[41] We believe this is the correct interpretation of the matter at issue.

The fact that a particular "labor outcome" does not dictate the extent or effect of ICC jurisdiction is a neces-

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[39] *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, Notice of Proposed Rulemaking served October 2, 1987.

[40] *Brotherhood of Locomotive Engineers* v. *C&NW*, *supra*; *Chicago and North Western Transportation Co.* v. *Kalo Brick and Tile Co.*, 450 U.S. 311 (1981).

[41] *RLEA* v. *Staten Island Railroad Corp.*, 792 F.2d 7 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 927 (1987).

sary correlative to the Commission's discharge of its responsibilities. That the concern for labor equity is only one of many conflicting aspects of National Transportation Policy should not be seen as a derogation of the agency's authority—rather it is precisely the reason why the Interstate Commerce Act must be recognized to have preeminence. It is the public policy of this Nation to regulate and supervise transportation at the national level so as to ensure the essential benefits of a critical aspect of commerce. While the means of regulation have changed markedly over the decades, the exclusive and plenary nature of the Commission's jurisdiction over consolidations, sales and abandonment has been consistently upheld. In the discharge of our responsibilities, we are charged with the expert resolution of many-sided conflicts between disputants, public and private. The recitation above of the factors leading to our small-railroad policy illustrates the complexity of the process and information that led to our present policy.

As with all adversarial proceedings those which come before the Commission generate winners and losers, but it must also be clear that participants ought to, after exhausting lawful appeals aimed at our authority and reasonableness, be reconciled to the process. Allowing a dispersion of authority will compound the problems to the detriment of the public and the transportation system. In the matter at hand, it cannot be doubted that a strike to prevent ICC-approved abandonment is susceptible to injunction. But it is now contended that such a strike can be used to prevent the development of an advantageous alternative to abandonment, despite the fact that Commission jurisdiction over these types of restructuring is, in all relevant aspects, identical. Our expertise and experience, combined with our system-wide responsibilities, lead us to the conclusion that neither the public nor labor is adequately protected by encouraging a system that prefers abandonment to rejuvenation. We do not believe the law is so structured as to compel that outcome.

Organized as it is, FRVR stands a far better chance of developing a self-sustaining rail operation than does CNW. Over the past quarter century the miles of road operated by CNW has decreased by a third.[42] Its management goals include further reduction in size, either through line sales or abandonment. Whether the lines at issue here could be abandoned immediately under existing law has not been demonstrated. However, fierce trucking competition combined with CNW's comparative disadvantage in rail costs significantly increase the potential of future abandonment. Clearly, the National Transportation Policy will be advanced by permitting the sale of these lines to a willing, experienced and optimistic group of managers, who will in turn rely on experienced labor and a commitment to the local customer base in an attempt to revive and preserve competitive rail transportation for this region of Wisconsin.

This action will not significantly affect either the human environment or energy conservation.

It is ordered:

The Petition of CNW and FRVR for an order clarifying jurisdiction and other matters is granted.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Lamboley and Simmons. Commissioners Lamboley and Simmons dissented with separate expressions.

NORETA R. MCGEE
Secretary

(SEAL)

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[42] *Moody's Transportation Manual* (1963 and 1987 issues indicates that CNW operated over 15 thousand miles of road in 1962 (including miles operated under contract and trackage rights) but that total had declined to slightly over 10 thousand miles by 1986.

COMMISSIONER SIMMONS, dissenting:

I would have denied the petition for clarification. I have supported the policy expressed by the majority because I believe it has contributed, to some extent, to the preservation of rail lines that otherwise would have been abandoned. However, I do not agree with the majority's use of such glowing terms to describe the efficacy of the Commission's denial of labor protection in so-called "short" line sales under 49 U.S.C. 10901. The language of the decision strongly implies that there can be virtually no valid justification for departure from this policy. Indeed, the decision to grant the petition for clarification and enter this declaratory order to enunciate a policy that has long been settled and affirmed in the courts indicates a certain lack of objectivity and fairness in the application of that policy.

We must not lose sight of our responsibility to weigh the interests of labor as a part of the public interest considerations associated with section 10901 sales. Neither this responsibility, nor the policy of which it is a part is enhanced by the gratuitous declaratory order entered here by the majority.

COMMISSIONER LAMBOLEY, dissenting:

While no one disputes the authority of the Commission to issue declaratory orders,[1] I believe to do so in this instance is an inappropriate use of process. In my view, there is insufficient evidence of controversy or uncertainty to warrant the issuance of this "clarifying" decision.

In invoking the class exemption process under Ex Parte No. 392 (Sub-No. 1)[2] petitioners have also requested

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[1] 5 U.S.C. 554(e).

[2] Ex Parte No. 392 (Sub-No. 1), *Class Exemption for Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985).

that the agency declare that its authority under 49 U.S.C. 10901 supersedes the provisions of the Railway Labor Act (RLA[3] and the Norris-LaGuardia Act.[4] They do so because of an alleged "climate of uncertainty" which it is claimed impedes consummation of the proposed transaction. Upon closer examination it becomes evident that the alleged controversy or uncertainty results from judicial decisions as well as petitioner's own conduct, neither of which the declaratory order requested from this agency will necessarily resolve. Indeed, this order may well exacerbate matters not only for this case but for constructive activities in this forum on such issues in the future.

Petitioners argue such action is necessary because several recent court decisions[5] "reflects a misapplication of the accommodation doctrine and a misunderstanding of this Commission's role in addressing labor issues pertaining to transactions within its jurisdiction." The petitioners do not agree with the outcome of judicial action in which they did not participate, although the Commission did. Without more, the petitioners simply request that the Commission here render a "proper" interpretation of applicable law by declaratory order. Petitioners offer neither substantial reason nor purpose for their request as it may relate to judicial activity.

Additionally, the petitioners claim the Commission's declaratory order is necessary because, while the CNW has met with the rail unions and informal discussions

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[3] 45 U.S.C. 151, *et seq.*

[4] 29 U.S.C. 101, *et seq.*

[5] *Railway Labor Executives' Association v. Pittsburgh & Lake Erie R. Co.*, —— F.2d —— (No. 87-3664, 3rd Cir. October 26, 1987) (*P&LE I*) and *Railway Labor Executives' Association v. Pittsburgh and Lake Erie R. Co.*, Civil Action No. 87-1745 (W. D. Pa. Nov. 1987), appeal pending *sub nom. Railway Labor Executives' Ass'n v. Lake Erie Co.*, No. 87-3797 (3rd Cir. filed Nov. 25, 1987) (*P&LE II*).

have taken place, no agreements have been reached since the unions believe (apparently contrary to petitioners) that RLA procedures apply to such discussions. The petitioners do not explain why they simply do not file a request with the Commission to fashion and impose appropriate protective conditions, with post consummation negotiation and arbitraiton procedures, if need be. Such request for relief would squarely address alleged controversy or uncertainty concerns relating to the process and substance of negotiation.

In sum, neither judicial action nor voluntary conduct is sufficient premise upon which to establish controversy or uncertainty as cause for declaratory relief in this case.

Further, quite apart from the lack of any legitimate, demonstrable need for declaratory relief, I fail to see that this order makes any significant contribution toward resolution of statutory "accommodation" issues. There is little doubt that the Commission does not have the requisite *jurisdiction* to interpret the applicability and scope of statutes other than the ICA. Certainly the agency may "express its viewpoint". Such as it is. It is a position which has been expressed repeatedly in court briefs[6] submitted by the Commission, and is well known. This decision appears to be little more than an attempt to supplement arguments in briefs previously filed and bolster prior discussion in Ex Parte No. 392 (Sub-No. 1).[7] It is self-serving and offers no new instruction.

Moreover, of particular concern here, is the eagerness to justify a well known position, the effect of which places the Commission in the position of apparent bias. This is especially true here because, in addition to the extended

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[6] See for example the Commission's brief in *P&LE II*, also a letter to District Judge dated October 8, 1987.

[7] Ex Parte No. 392 (Sub-No. 1), *Class Exemption for Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985).

discussion of the Ex Parte No. 392 (Sub-No. 1) and preemption matters, this decision addresses specific employment security and displacement issues in this transaction, and consequently, in anticipatory fashion, effectively prejudices and precludes meaningful consideration of any subsequent petition for revocation raising protective condition issues. The lack of agency constraint here has unfortunate ramifications.

Finally, after all things are considered, it is fair to say that any instability or uncertainty over employment security and displacement issues is largely a consequence of our own doing by decisions such as this, as well as those in Ex Parte No. 392 (Sub-No. 1) and its progeny. Legitimate transportation transactions under the ICA have been authorized in a manner which encourages and permits unilateral abrogation of legitimate, collective bargaining agreements and statutory requirements of the RLA, without procedural or substantive accommodation of respective interests. Mutuality and reciprocity in collective bargaining contemplated by the RLA and resultant market-based arrangements have been nullified by our approach. It is small wonder than that the incentives for problem solving and dispute resolution through the negotiation process have been diminished and relations have become unstable.

It has become abundantly clear in these cases that the essence of the dispute is labor relations issues, not transportation.[8] Assuming jurisdiction, the Commission's current fixed position prevents adjustment and resolution in this forum.

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[8] See, also letter dated December 2, 1987 in Finance Docket No. 31163, *Winoma Bridge Railroad Company Trackage Rights—Burlington Northern Railroad Company.*

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

September 8, 1988

Before

HON. HARLINGTON WOOD, JR., Circuit Judge
HON. MICHAEL S. KANNE, Circuit Judge
HON. JESSE E. ESCHBACH, Senior Circuit Judge

No. 88-1504

CHICAGO & NORTHWESTERN TRANSPORTATION COMPANY,
Plaintiffs-Appellees,

vs.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

Paul E. Plunkett, Judge—No. 88 C 444

ORDER

This matter comes before the Court on the following documents:

"EMERGENCY MOTION BY APPELLANTS FOR A STAY OF THE STRIKE INJUNCTION OR, ALTERNATIVELY, FOR AN INJUNCTION TO PROHIBIT THE SALE PENDING PETITION FOR A WRIT OF CERTIORARI" filed by defendants-appellants on September 2, 1988.

"OPPOSITION OF APPELLEES C&NW AND FRVR TO APPELLANTS' EMERGENCY MOTION OR A STAY OF THE STRIKE INJUNCTION OR FOR AN INJUNCTION TO PROHIBIT THE LINE SALE PENDING PETITION FOR A WRIT OF CERTIORARI" filed by plaintiffs-appellees on September 7, 1988.

Rule 44.2 of the Supreme Court's Rules allows a party to file a motion to stay the enforcement of the judgment for which review is being sought in the Supreme Court. The factors regulating issuance of a stay pending appeal are: 1. whether the stay applicant has made a strong showing of likelihood of success on the merits; 2. whether the applicant will suffer irreparable harm in the absence of the stay; 3. whether a stay will substantially harm other parties to the proceedings; and 4. where the public interest lies. *Hilton v. Braunskill*, —— U.S. ——, 107 S. Ct. 2133 (1987). In this case, appellants must also make a substantial showing that their petition for certiorari will raise an important question meriting review by the Supreme Court and likely to garner the votes of four justices in favor of granting certiorari.

Appellants argue that the Supreme Court is likely to grant their petition for certiorari because it has done so in other railroad line cases currently pending before the Supreme Court. Those cases, however, do not involve a claim by the carrier, that its actions in abolishing jobs were permitted under existing labor agreements. *See Chicago and Northwestern Transportation Co. v. Railway Labor Executives Assoc.*, No. 88-1504, slip op. at

13-14, and 16-17 n.3 (7th Cir., Aug. 23, 1988). Accordingly, we find that appellants' arguments, which have already been rejected by the district court and this court, are unlikely to win Supreme Court review, and thus are not likely to succeed on the merits. In addition, appellees would suffer substantial hardship if a stay were imposed, as further delay could jeopardize the proposed sale. In contrast, we have already held that the sale will not irreparably harm appellants as it involves the sale by C.&N.W. "of a small portion of its track while maintaining the remainder of its rail operations and continuing to honor its collective bargaining agreements." Slip op. at 17, n.3. Finally, the public interest lays, in this case, in promoting the finality of judgments.

Accordingly, upon careful review of the pleadings filed in support of this motion, as well as the briefs and arguments already considered by the court, and in light of this court's opinion of August 23, 1988,

IT IS ORDERED that the EMERGENCY MOTION BY APPELLANTS FOR A STAY OF THE STRIKE INJUNCTION OR, ALTERNATIVELY, FOR AN INJUNCTION TO PROHIBIT THE SALE PENDING PETITION FOR A WRIT OF CERTIORARI is DENIED.

APPENDIX C

United States Court of Appeals Decisions Applying "Arguable" Standard for Identifying Minor Disputes in Status Quo and Strike Cases

D.C. Circuit:

Air Line Pilots Ass'n v. *Eastern Air Lines*, Nos. 88-7201—88-7204 (D.C. Cir. Sept. 30, 1988)

International Bhd. of Elec. Wkrs. v. *Washington Terminal Co.*, 473 F.2d 1156, 1172 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 906 (1973)

Southern Ry. v. *Brotherhood of Loc. Firemen & Enginemen*, 384 F.2d 323, 327 (D.C. Cir. 1967)

First Circuit:

RLEA v. *Boston & Maine Corp.*, 808 F.2d 150, 159 (1st Cir. 1986), *cert. denied*, 108 S. Ct. 102 (1987)

Maine Central R.R. v. *United Transp. Union*, 787 F.2d 780, 783 (1st Cir.), *cert. denied*, 479 U.S. 848 (1986)

Brotherhood of Loc. Engineers v. *Boston & Maine Corp.*, 788 F.2d 794, 798 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986)

Carbone v. *Meserve*, 645 F.2d 96, 98-99 (1st Cir.), *cert. denied*, 454 U.S. 859 (1981)

Airlines Stewards and Stewardesses Ass'n v. *Caribbean Atlantic Airlines*, 412 F.2d 289, 291 (1st Cir. 1969)

Second Circuit:

Baylis v. *Marriott Corp.*, 843 F.2d 658, 663 (2d Cir. 1988)

Air Line Pilots Ass'n v. *Trans World Airlines*, 713 F.2d 940, 948 (2d Cir. 1983), *rev'd on other grounds*, 469 U.S. 111 (1985)

Local 553, Transport Workers v. *Eastern Air Lines*, 695 F.2d 668, 673 (2d Cir. 1982)

Rutland Ry. v. *Brotherhood of Loc. Engineers*, 307 F.2d 21, 36 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963)

Third Circuit:

RLEA v. *Consolidated Rail Corp.*, 845 F.2d 1187, 1190-91 (3d Cir.), *cert. granted*, No. 88-1 (Oct. 3, 1988)

Goclowski v. *Penn Central Transp. Co.*, 571 F.2d 747, 755 n.11 (3d Cir. 1977)

United Transp. Union v. *Penn Central Transp. Co.*, 505 F.2d 542, 544 (3d Cir. 1974)

Fourth Circuit:

Dement v. *Richmond, F. & P. R.R.*, 845 F.2d 451, 463 (4th Cir. 1988)

Kushto v. *Brotherhood of Ry., Airline & S.S. Clerks*, 818 F.2d 290, 293 (4th Cir. 1987)

Norfolk & P.B.L. R.R. v. *Brotherhood of R.R. Trainmen*, 248 F.2d 34, 43 n.4 (4th Cir.), *cert. denied*, 355 U.S. 914 (1958)

Fifth Circuit:

International Bhd. of Teamsters v. *Southwest Airlines*, 842 F.2d 794, 803 (5th Cir. 1988), *rehearing en banc pending*

St. L. S.W. Ry. v. *United Transp. Union*, 646 F.2d 230, 233 (5th Cir. 1981)

Ruby v. *TACA Int'l Airlines*, 439 F.2d 1359, 1363 (5th Cir. 1971)

Railway Express Agency, Inc. v. *Brotherhood of Ry., Airline & S.S. Clerks*, 437 F.2d 388, 392 (5th Cir.), *cert. denied*, 403 U.S. 919 (1972)

International Bhd. of Teamsters v. *Braniff Int'l Airways*, 437 F.2d 1272, 1274 (5th Cir. 1971)

United Indus. Workers v. *Galveston Wharves*, 351 F.2d 183, 188 (5th Cir. 1965)

St. L., S.F. & T. Ry. v. *Railroad Yardmasters of America*, 328 F.2d 749, 753 (5th Cir.), *cert. denied*, 377 U.S. 980 (1964)

Sixth Circuit:

Brotherhood of Loc. Engineers v. *Consolidated Rail Corp.*, 844 F.2d 1218, 1221 (6th Cir. 1984)

Brotherhood Ry. Carmen v. *Norfolk & W. Ry.*, 745 F.2d 370, 375 (6th Cir. 1984)

United Transp. Union v. *Baker*, 482 F.2d 228, 230 (6th Cir. 1973)

Seventh Circuit:

Brotherhood of Ry., Airline & S.S. Clerks v. *Atchison, Topeka & Santa Fe Ry.*, 847 F.2d 403, 406 (7th Cir. 1988)

RLEA v. *Norfolk & W. Ry.*, 833 F.2d 700, 704 (7th Cir. 1987)

National Ry. Labor Conference v. *International Ass'n of Machinists*, 830 F.2d 741, 746 (7th Cir. 1987)

Chicago & N.W. Transp. Co. v. *International Bhd. of Elec. Wkrs.*, 829 F.2d 1424, 1429 (7th Cir. 1987)

Brotherhood of R.R. Signalmen v. *Burlington Northern R.R.*, 829 F.2d 617, 619 (7th Cir. 1987)

Atchison, T. & S.F. Ry. v. *United Transp. Union*, 734 F.2d 317, 321 (7th Cir. 1984)

Chicago & N.W. Transp. Co. v. *United Transp. Union*, 656 F.2d 274, 278-79 (7th Cir. 1981)

United Transp. Union v. *Baker*, 499 F.2d 727, 730 (7th Cir.), *cert. denied*, 419 U.S. 839 (1974)

Eighth Circuit:

International Ass'n of Machinists v. *Soo Line R.R.*, 850 F.2d 368, 376 (8th Cir. 1988) (*en banc*)

Brotherhood Ry. Carmen v. *Alton & S. Ry.*, 849 F.2d 1111, 1114 (8th Cir. 1988)

International Ass'n of Machinists v. *Northwest Airlines*, 843 F.2d 1119, 1122-23 (8th Cir.), *vacated as moot*, (August 4, 1988)

Brotherhood of Maintenance of Way Employees v. *Chicago & N.W. Transp. Co.*, 827 F.2d 330, 333 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 1291 (1988)

Brotherhood of Maintenance of Way Employees v. *Burlington Northern R.R.*, 802 F.2d 1016, 1022 (8th Cir. 1986)

Independent Fed'n of Flight Attendants v. *Trans World Airlines*, 655 F.2d 155, 158-59 (8th Cir. 1981)

United Transp. Union v. *Burlington Northern, Inc.*, 458 F.2d 354, 357 (8th Cir. 1972)

Northwest Airlines, Inc. v. *Air Line Pilots Ass'n*, 442 F.2d 246, 248-49 (8th Cir. 1970)

Ninth Circuit:

Brotherhood of Loc. Engineers v. *Burlington Northern R.R.*, 838 F.2d 1102, 1105 (9th Cir. 1988)

Brotherhood of Loc. Engineers v. *Burlington Northern R.R.*, 838 F.2d 1087, 1091 (9th Cir. 1988), *petition for certiorari pending*, No. 87-1631

IBTCWHA, Local Union No. 2707 v. *Western Air Lines*, 813 F.2d 1359, 1362 (9th Cir.), *vacated and remanded for consideration of mootness*, 108 S. Ct. 53 (1987)

Brotherhood of Ry. Carmen v. *Pacific Fruit Express Co.*, 651 F.2d 651, 652 (9th Cir. 1981)

Southern Pacific Transp. Co. v. *United Transp. Union*, 491 F.2d 830, 833 (9th Cir.), *cert. denied*, 416 U.S. 985 (1974)

Switchmen's Union of North America v. *Southern Pacific Co.*, 398 F.2d 443, 447 (9th Cir. 1968)

(3) (5)

Nos. 88-464 and 87-1911

FILED
SEP 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY, *et al.*,
Respondents.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

GUILFORD TRANSPORTATION INDUSTRIES, INC., *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Courts of Appeals for the First and Seventh Circuits

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SUPPLEMENTAL BRIEF OF PETITIONERS

WILLIAM G. MAHONEY
JOHN O'B. CLARKE, JR.*
HIGHSAW & MAHONEY, P.C.
Suite 210
1050 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500
Attorneys for Petitioners Railway Labor Executives' Association, et al.

* Counsel of Record

Date: September 30, 1988

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-464

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY, *et al.*,
Respondents.

No. 87-1911

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

GUILFORD TRANSPORTATION INDUSTRIES, INC., *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Courts of Appeals for the First and Seventh Circuits

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SUPPLEMENTAL BRIEF OF PETITIONERS

In May 1988, petitioners Railway Labor Executives' Association [hereinafter, "RLEA"] and fifteen (15) of its member organizations filed a petition with this Court for a writ of certiorari to the United States Court of Appeals for the First Circuit, asking this Court to review the judgment of the First Circuit in *RLEA v. Guilford Transportation Industries, Inc.*, 843 F.2d 1383 (1st Cir.

1988) (table). On September 16, 1988, petitioner RLEA and fourteen (14) of its member organizations filed a petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit, asking this Court to review the decision of that Court in *Chicago & North Western Transportation Company v. RLEA*, 7th Cir., No. 88-1504, decided August 23, 1988. This Supplemental Brief is respectfully submitted by petitioners pursuant to Rule 22.6 of the Rules of this Court to bring to this Court's attention certain recent developments affecting these cases.

I. No. 87-1911, *RLEA v. Guilford Transportation Industries, Inc.*

A. Status Of the Arbitrated Implementing Arrangement

On June 12, 1988, an arbitrator issued an award devising the implementing arrangement required by Article I, Section 4 of the employee protective provisions imposed by the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] as a condition of the lease exemptions which petitioners in No. 87-1911 are asserting were entered into by Guilford to avoid the carriers' Railway Labor Act obligations. *See, Delaware & Hudson Ry. —Lease and Exemption*, 4 I.C.C.2d 322 (1988). Respondents asserted that the obligations imposed upon them by that implementing arrangement may render rail labor's claims in the case before this Court moot by providing the same relief which petitioners are seeking through this case. Respondents' Brief in No. 87-1911 at 21. Rail labor recognized that the implementing arrangement may affect the justiciability of this case, but noted that it was too early to determine the impact of either that arbitration decision, or of another arbitration award, on the continued existence of a case or controversy in this case. Supplemental Brief at 5-6. Rail labor respectfully submits that it is still too early to predict the

actual impact of the arbitration awards, but at present those decisions, especially the arbitrated implementing arrangement, have not affected the continued existence of a live case or controversy here. Moreover, subsequent developments in the implementing arrangement matter have emphasized the pressing need for this Court to grant the petition in No. 87-1911.

After the petition was submitted to this Court for consideration at the end of last term, the ICC issued a decision on July 15, 1988, staying the arbitrated implementing arrangement, pending administrative review by the Commission of that decision. That stay order has been reproduced herein as Appendix A. Guilford's rail carriers [1] subsequently filed a petition with the ICC on July 25, 1988, asking the Commission to set that arbitration award aside; RLEA responded on September 2, 1988. Since the Commission stated that it will issue "a final decision in this proceeding . . . no later than 45 days after the record is complete" (Appendix A at 2a), it is probable that the commission will issue its ruling on Guilford's petition by October 17, 1988.[2]

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[1] The "Guilford rail carriers" as used herein, refers to the Boston and Maine Corporation, Maine Central Railroad Company, Portland Terminal Company, and Springfield Terminal Railway Company. The Delaware & Hudson Railway Company has not participated in the ICC proceedings since June 20, 1988, and it is not actively participating herein because it is currently in reorganization under Subchapter IV of Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1161, *et seq.*, and is thus protected by the automatic stay of 11 U.S.C. § 362.

[2] On September 13, 1988, Guilford's rail carriers filed a motion with the ICC for leave to file a reply; that motion may extend the time in which the ICC will issue its decision, but such an enlargement, petitioners submit, appears unlikely.

B. Respondents, In Their Petition To The ICC To Set Aside The Arbitrated Implementing Arrangement, Have Admitted That They Entered Into The Leases To Evade Collective Bargaining Obligations

RLEA has asserted that this case, together with the two other petitions by RLEA in Nos. 88-464 and 87-2049, present the best vehicles of the many cases pending before this Court to resolve the important jurisdictional and conflict of laws issues arising from the ICC's and the railroads' contentions that the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, preempts the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, and makes that labor statute unenforceable. Pet. in No. 87-1911 at 24-25; Pet. in No. 88-464 at 15-16. One of the reasons advanced by petitioners for that assertion as to the "cert-worthiness" of this case, was their observation that the issues in No. 87-1911 were not clouded by a factual dispute. Pet. in No. 87-1911 at 24-25.

As stated above, Guilford's rail carriers, except for the Delaware & Hudson Railway Company, filed a petition with the ICC on July 25, 1988, to set aside the arbitrated implementing arrangement. That petition, rail labor respectfully submits, contains several admissions which make rail labor's observation that there are no factual disputes as to the intent behind the leases crystal clear. For example, the Guilford rail carriers stated as follows in describing the leases:

> Through the lease transactions, several railway companies serving the New England freight market and facing extreme financial hardship were able to consolidate their services and offer more competitive pricing by lowering labor costs. These savings were to be accomplished not by reductions in force, but through the elimination of obsolete and costly work rules that had plagued the operation of the railroads.

Guilford Pet. to ICC, dated July 25, 1988 at vi. Similar statements were made throughout that pleading, for Guil-

ford argued that the arbitrated implementing arrangement should be set aside because, by requiring the Springfield Terminal Railway Company to honor the lessors' collective bargaining agreements, the arbitrator failed to abide by the ICC's charge to him; as the Guilford carriers stated:

> Because the Commission in its prior order did *not* intend that work rules from the leased lines be carried over wholesale to the ST operation, the arbitration award here must be vacated as incompatible with the Commission's order [served February 19, 1988].

Guilford Pet., *supra*, at 29 (emphasis in original).

Rail labor continues to maintain that the case in No. 87-1911 presents an excellent vehicle to address the relationship between the transportation and the labor statutes,[3] for the record in that case, together with the ICC's actions in dealing with the manner in which employees should be treated by these leases, show the need for judicial, as contrasted with ICC, enforcement of the commands of the labor statute. Guilford has been able for the past twenty-one months to use the ICC's exemption powers under 49 U.S.C. § 10505 to abrogate rail labor's collective bargaining agreements, but petitioners have been unable to obtain judicial consideration of their challenge to that abrogation of contractual and statutory rights because the courts have viewed this subject matter as having been committed by Congress to the jurisdiction of the ICC. That denial of a judicial forum has, in effect, made the transportation Act and its policies paramount to the Railway Labor Act and its policies, even though Congress intended the two statutory schemes to exist side-by-side.

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[3] It should be noted that a petition for a writ of certiorari was filed on September 26, 1988, in *City of Galveston v. RLEA*, Sup. Ct. No. 88-517. That petition raises the issue of collateral attack comparable to that raised by RLEA in No. 87-1911, but in a 49 U.S.C.

II. No. 88-464, *RLEA v. Chicago & North Western Transportation Company*

A. Respondent Chicago & North Western Transportation Company Has Invoked the Mediatory Jurisdiction Of The National Mediation Board

Subsequent to the filing of the petition for a writ of certiorari in No. 88-464, *RLEA v. Chicago & North Western Transportation Company*, respondent Chicago & North Western Transportation Company [hereinafter, "C&NW], filed sixteen (16) applications with the National Mediation Board [hereinafter, "NMB"] for mediation under Section 5 First of the Railway Labor Act, 45 U.S.C. § 155 First. Those applications were filed on September 23, 1988, and requested that the Board mediate the disputes between rail labor and the C&NW growing out of the notices which petitioners in No. 88-464 had served upon the C&NW under Section 6 of the Railway Labor Act, 45 U.S.C. § 156, to negotiate agreements for employees affected by the Duck Creek South line sales. Respondent C&NW, however, stated in its cover letters to its applications for the Board's mediatory services that:

> The Carrier has and still does contest the validity of these [Section 6] notices and invokes the services of the National Mediation Board without waiving its objections to the validity of these notices.

E.g., letter from Ronald J. Cuchna, C&NW Vice President-Labor Relations, to C.R. Barnes, NMB Executive Director, dated September 22, 1988 involving Brotherhood of Maintenance of Way Employes.

Those requests for mediation were docketed by the NMB on September 23, 1988, as NMB Case Nos. A-12051 through, and including, A-12066. When it docketed those requests, the NMB sent a letter to each organization

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§ 10901 sale case similar to those pending in Sup. Ct. Nos. 87-2049 and 87-1888.

requesting comments. One of those letters is reproduced herein as Appendix B. In addition, the NMB stated that: "The parties are reminded of the status quo provisions of the Railway Labor Act." [4] Appendix B at 9a.

CONCLUSION

Petitioners respectfully submit that this Court should grant the writs in these cases. Moreover, petitioners continue to maintain that this Court should grant the writ in No. 87-2049, *RLEA v. C&NW*, which, when combined with the issues presented by these cases, should present the crucial issues in a manageable manner.

Respectfully submitted,

WILLIAM G. MAHONEY
JOHN O'B. CLARKE, JR.*
HIGHSAW & MAHONEY, P.C.
Suite 210
1050 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500
Attorneys for Petitioners Railway Labor Executives' Association, et al.

Date: September 30, 1988

* Counsel of Record

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[4] By quoting that admonition by the NMB, petitioners do not intend to convey the impression that this statement has any binding force on either party, for this Court has observed that: "[T]he Mediation Board has no adjudicatory authority with regard to major disputes, nor has it a mandate to issue regulations construing the [Railway Labor] Act generally." *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142, 158-59 (1969).

APPENDICES

APPENDIX A

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 30965 (Sub-No. 1)

DELAWARE AND HUDSON RAILWAY COMPANY—
LEASE AND TRACKAGE RIGHTS EXEMPTION—
SPRINGFIELD TERMINAL RAILWAY COMPANY

REVIEW OF ARBITRAL AWARD

DECISION NO. 2

Decided: July 8, 1988

Service Date: July 15, 1988

On June 22, 1988, Boston and Maine Corporation (B&M) and Maine Central Railroad Company (MEC) filed a petition for stay of an arbitrator's award issued pursuant to our decision in *D&H Ry.—Lease and Trackage Rights Exempt.—Springfield Term.*, 4 I.C.C.2d 322 (1988) (*Springfield Terminal*),[1] pending administrative review of the award.[2] The decision, unless stayed, becomes effective July 12, 1988. Portland Terminal Company (PT) and Springfield Terminal Railway Company (ST) indicated on June 23, 1988, that they join in the petition for stay.[3] On June 29, 1988, the Railroad [sic] Labor Executives' Association (RLEA) filed a reply in opposition to the railroads' petition for stay. The B&M, MEC,

[1] That proceeding embraced 17 additional notices of exemption.

[2] The carriers' petition for administrative review is due July 25, 1988.

[3] The Delaware and Hudson Railway Company (D&H), a party to the *Springfield Terminal* proceeding, filed a petition for reorganization under Chapter 11 of the Bankruptcy Code on June 20, 1988, and has not joined in the petition for stay.

ST and PT (herein "the GTI carriers" or "GTI") filed a motion for leave to file a sur-reply and a sur-reply on July 6, 1988. In the interest of obtaining the benefits of all arguments, the motion to file the sur-reply will be granted. *See* Finance Docket No. 28583 (Sub-No. 24), *Burlington Northern Inc.—Control and Merger—St. Louis-San Francisco Railway Co.*, served June 23, 1988, at 1. The petition for stay will be granted. We will expedite our consideration of GTI's petition for administrative review of the arbitral award, and a final decision in this proceeding will be issued no later than 45 days after the record is complete.

The decision in *Springfield Terminal* directed the parties to negotiate an implementing agreement for a series of lease transactions involving the rail carrier subsidiaries of Guilford Transportation Industries, Inc. (GTI), and, if an agreement could not be reached through negotiation, to submit the matter to arbitration. The parties' dispute was eventually submitted to an arbitrator, and an arbitral award was issued June 12, 1988.[4] The implementing agreement imposed by the award would require ST to apply the rates of pay, rules, and working conditions formerly required by the lessor carriers' collective bargaining agreements to its operations on the GTI system.

The decisions of arbitrators who resolve disputes arising out of labor protective conditions imposed by this Commission are treated as decisions of the Commission. *See United Transp. Union* v. *Norfolk & Western Ry.*, 822 F.2d 1114 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 700 (1988). We have noted that arbitrators' decisions are not final orders and are subject to administrative review by this agency. *See* Docket No. AB-1 (Sub-No. 83), *Chicago & North Western Transportation Co.—Abandonment*, 3 I.C.C.2d 729 (1987) (*Lace Curtain*).

[4] The GTI carriers received a copy of the award on June 15, 1988.

In our decision in *Springfield Terminal*, we expressly stated that we would review any appeals from any arbitration decisions rendered pursuant to our directive that the parties negotiate an implementing agreement or, failing agreement, submit the matter to arbitration. Since the Commission in *Springfield Terminal* expressly provided that we would review an arbitrator's decision, the grant of a stay pending such review is particularly appropriate. The position of the petitioners is analogous to parties filing administrative appeals of right under 49 CFR 1115.2, where the timely filing of an appeal to an initial decision automatically stays its effect pending the appeal. In deciding the petition for stay, the guidelines set forth in *Washington Metropolitan Area Transit Commission* v. *Holiday Tours Inc.*, 559 F.2d 841 (D.C. Cir. 1977) have nevertheless been followed and applied to determine that the arbitrator's decision should be stayed pending appeal.

Petitioners B&M and MEC represent that the implementation of the arbitrator's decision, including the implementation of the B&M and MEC collective bargaining agreements in lieu of the agreements currently in effect on the ST system, would jeopardize the viability of their lines. In support, the GTI cites the recent bankruptcy and cessation of service of the Delaware & Hudson Railway Company (D&H), a GTI subsidiary. We precluded the D&H from leasing its lines to ST and it has remained subject to its existing collective bargaining agreement. In reply, RLEA argues that the GTI petitioners have not supported their allegations of irreparable harm, noting that the B&M and MEC were able to operate under existing work rules in the past. In addition, RLEA argues that the GTI carriers willingly accepted the obligation to comply with the arbitrator's award because they consummated the leases of the lines to ST before we ruled on the petitions filed by RLEA and others to revoke the class exemption pursuant to which the lease transactions were made.

The GTI petitioners argue that granting a stay will not irreparably harm other parties, *i.e.*, the employees affected by the arbitrator's decision, since interest will accrue on their claims for money damages and that those damages will continue to accrue during the pendency of the appeal should the GTI petitioners fail to prevail. By contrast, GTI would have no way to be compensated for expenses it incurred pursuant to the arbitrator's decision should it be reversed on appeal.

RLEA argues that the harm which would occur to the employees from a delay in implementing the arbitrator's award would outweigh any harm that would be incurred by GTI. Specifically, RLEA states that "it is impossible at a later date to undo the numerous and varied exercises of options which employees must exercise to earn a livelihood." RLEA notes that, at present, GTI is reinstating employees pursuant to a separate arbitration award concluding a dispute over safety practices on the carrier. RLEA states that reinstating these employees on a basis other than the seniority system established by the arbitrator would compound "an already highly inequitable, dangerous and harmful situation."

Both sides argue that the balance of equities and consideration of the public interest favor their positions.

In deciding whether to grant the stay, the Commission is charged, as the parties note, not only with balancing the equities affecting the parties but also with considering the effect of our action on the general public. Rail service in New England on the Guilford system has been in turmoil for some time. In our decision in *Springfield Terminal*, we sought to establish a procedure that would not only resolve the conflicting claims but would also provide a basis for the establishment of stable and dependable rail service for New England. While it is premature to state whether or not the Commission will overturn the award in reponse to GTI's appeal of the arbitrator's de-

cision, GTI has raised difficult and substantial legal issues and, therefore, a stay is warranted. If the appeal should be granted, failure to stay the arbitration decision would have created a situation where substantial changes made pursuant to the leases implemented under the class exemption were undone by the arbitrator's decision and were then reimposed. Those gyrations might be sufficient to reduce an already difficult situation to chaos. If the appeal is ultimately denied, the return to the B&M and MEC collective bargaining agreements can be implemented then, with no more and hopefully less friction than doing so now, since the GTI carriers would have had time to plan for the possible implementation of the arbitrator's award.

In addition, the allegation of the GTI carriers that the implementation of the award could impair their visibility and jeopardize service to shippers cannot be ignored. The bankruptcy of the D&H and its cessation of service, while not dispositive of the situation on the B&M and MEC, offers some parallels. It also offers the reminder that rail service can cease and its cessation can harm the public. If the GTI carriers are to be believed, this may happen anyway if the appeal is denied. However, as long as there is the possibility that the award may be overturned, the Commission should seek to avoid irreparable harm to public as well as private interests unless the harm to the interests affected by implementing the stay is more substantial. A delay in the implementation of the arbitrator's decision will chiefly result in an economic burden on the affected employees. While this harm is significant, it is, as the courts have found in upholding this Commission's *Mendocino* labor protective conditions,[5] compensable

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[5] *Aff'd sub nom. Railway Labor Executives' Association* v. *United States*, 675 F.2d 1248 (1982), *See* Finance Docket No. 30532, *Maine Central R.R., et al.—Exemption* (not printed), served September 13, 1985, *aff'd sub nom. Railway Labor Executives' Association* v. *ICC*, No. 85-1636 (D.C. Cir. March 16, 1987).

through reparations. This reparable injury does not outweigh the public's interest in the maintenance of reliable rail service in New England.

The U.S. Court of Appeals for the D.C. Circuit discussed the significance of the consideration of the public interest in *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F.2d 921, 925 (D.C. Cir. 1985) in stating:

> Where lies the public interest? In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interests of private litigants must give way to the realization of public purposes.

It is a "fundamental principle * * * that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.'" *American Power and Light Co.* v. *SEC*, 329 U.S. 90, 112 (1946), quoting *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 117, 194 (1941). *See also Atchison, Topeka and Santa Fe Railway Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 825 (1973).

On balance, the competing equities of the private parties and the consideration of the public interest support the grant of a stay pending administrative review by this agency of the arbitrator's decision.

This decision will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The arbitral award is stayed pending administrative review by the Commission.

2. This decision is effective on the dated served.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Simmons, and Lamboley. Commissioner Sterrett dissented and would have granted only a housekeeping stay until August 1, 1988, to evaluate whether a further stay would be appropriate in light of the carriers' petition to be filed by July 25, 1988. Commissioner Lamboley dissented with a separate expression.

[SEAL]

NORETA R. MCGEE
Secretary

COMMISSIONER LAMBOLEY, dissenting:

Given the relevant circumstances in this proceeding, I would not grant the request for stay.

APPENDIX B

NATIONAL MEDIATION BOARD
Washington, D.C. 20572

September 23, 1988

Case No. A-12059

Mr. Ronald J. Cuchna
Vice President-Labor Relations
Chicago and Northwestern Transportation Co.
One North Western Center
Chicago, IL 60606

Mr. Geoffrey N. Zeh, President
Brotherhood of Maintenance of Way Employes
12050 Woodward Avenue
Detroit, MI 48203

Gentlemen:

The Board is in receipt of an application for mediation from the Chicago and Northwestern Transportation Company covering a dispute between that Carrier and the Brotherhood of Maintenance of Way Employes, on the following subject:

> "The organization's demands for various forms of protective benefits for employees affected by sale of line segments."

Mr. Zeh is requested to furnish this office promptly with any statement he may care to make on behalf of the Organization.

This application has been docketed as our Case No. A-12059 and will hereafter be referred to by that number. A mediator will be assigned to mediate this dispute consistent with prior commitments.

The parties are reminded of the status quo provisions of the Railway Labor Act.

Sincerely,

/s/ Charles R. Barnes
CHARLES R. BARNES
Executive Director

CRB/ljb

Supreme Court, U.S.
FILED
OCT 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-464

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE IN OPPOSITION TO THE PETITION

DAVID P. LEE
Vice Chairman and General Counsel
National Railway Labor Conference
1901 L Street, N.W.
Washington, D.C. 20036
(202) 862-7000
Counsel of Record for Amicus Curiae

October 17, 1988

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IN THE

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OCTOBER TERM, 1988

No. 88-464

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

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TRANSPORTATION COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE IN OPPOSITION TO THE PETITION

This *amicus* brief is being filed with the written consent of the parties pursuant to Supreme Court Rule 36.1.

STATEMENT OF THE CASE

Respondent Chicago & North Western Transportation Company ("C&NW") has agreed, with the approval of the Interstate Commerce Commission under § 10901 of the Interstate Commerce Act,[1] to sell approximately 208

[1] 49 U.S.C. § 10901.

miles of railroad line in Wisconsin, known as the "Duck Creek South" lines, to respondent FRVR Corporation. C&NW proposes to abolish the jobs it now maintains along the lines upon consummation of the sale, acting under what it believes is express authority granted to it in "force-reduction" provisions in its collective bargaining agreements with the unions that represent affected employees. Petitioner Railway Labor Executives' Association ("RLEA"), on behalf of its member unions, contends to the contrary that the abolishments will change the status quo with respect to "rates of pay, rules, and working conditions" on the C&NW and would therefore give rise to a so-called "major dispute" and violate §§ 2 Seventh and 6 of the Railway Labor Act.[2]

RLEA threatened to strike C&NW over its alleged departure from the status quo. In January, 1988, C&NW filed suit in the district court for the Northern District of Illinois for a declaratory judgment that such a strike would be unlawful under both the Railway Labor Act and the Interstate Commerce Act. RLEA counterclaimed for a Railway Labor Act status quo injunction against the proposed job abolishments. On March 16, 1988, the district court, on cross-motions by the parties for preliminary injunctive relief, preliminarily enjoined the strike and refused to enjoin the job abolishments. The court found that C&NW's claimed justification for the

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[2] Section 2 Seventh provides that a carrier may not "change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements, except in the manner prescribed in such agreements or in [section 6] of this [Act]." 45 U.S.C. § 152 Seventh. Section 6 provides that either party may propose a "change in agreements" by written notice, and that while such notice is pending "rates of pay, rules, and working conditions shall not be altered by the carrier * * *." 45 U.S.C. § 156. RLEA claimed § 6 was applicable in this case because certain of its member unions had served notices proposing that C&NW agree to provide labor protection for employees affected by the job abolishments on the Duck Creek South lines.

job abolishments under the collective bargaining agreements could not be dismissed as frivolous, and thus held that RLEA's challenge to the abolishments presented an arbitrable "minor dispute" over the correct interpretation of the agreements under § 3 of the Railway Labor Act, 45 U.S.C. § 153. (Petition for Certiorari ["Pet."] at 30a). As the court noted, strikes over minor disputes are unlawful and enjoinable,[3] and courts lack jurisdiction to enjoin carriers from implementing their interpretations of labor agreements pending arbitration of minor disputes by adjustment boards under § 3 of the Railway Labor Act unless employees will suffer harm in the interim that cannot be remedied by an arbitrator.[4] (Pet. at 31a).

The United States Court of Appeals for the Seventh Circuit affirmed the district court's judgment on August 23, 1988. Setting forth the applicable Railway Labor Act law, the court of appeals explained that if a "dispute can be resolved by reference to the parties' collective bargaining agreement, *i.e.*, if it is 'arguably comprehended within an already existing collective bargaining agreement,' it is a minor dispute." (Pet. at 9a) (citations omitted). If, the court continued, " 'the parties disagree over whether the dispute can be resolved by reference to an agreement the dispute is minor unless the claims of contractual justification are 'frivolous' or 'obviously insubstantial.' " (*Id.* at 11a) (citations omitted). The court "carefully evaluated the claims of the parties and examined the evidence in the record as to the terms of their collective bargaining agreements and the rele-

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[3] The general ban on strike injunctions under the Norris-LaGuardia Act is accommodated to § 3 of the Railway Labor Act, which prescribes peaceful resolution of minor disputes through the arbitration process, as part of the "pattern of labor legislation." *Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30, 42 (1957).

[4] See *Locomotive Engineers* v. *M.-K.-T. R. Co.*, 363 U.S. 528 (1960).

vant past practices attendant to those agreements," and concluded that C&NW's position that the Duck Creek South job abolishments are authorized by its collective bargaining agreements "has at least an arguable basis in the * * * agreements and relevant past practice [and] cannot be said to constitute the type of clear departure from those agreements necessary to trigger a finding of a § 6 major dispute * * *." (*Id.* at 14a-15a). The court thus held that the dispute between the parties is minor, that any strike over it would be unlawful, and that the district court was "without jurisdiction to issue a broad status quo injunction." (*Id.* at 19a-20a). Finally, the court held that there was no occasion for the district court to exercise its extraordinary equitable powers to protect employees from irreparable harm pending arbitration of the dispute, because if the adjustment board "rejects C&NW's interpretation of the collective bargaining agreements and determines that the employees who are displaced by the challenged rail line sale are entitled to relief, it will be able to order the necessary payment of monies and adjustments in seniority levels it deems necessary to make those employees whole." (*Id.* at 21a).

INTEREST OF AMICUS CURIAE

The National Railway Labor Conference ("NRLC") is an unincorporated association which includes almost all of the nation's class I railroads among its members. NRLC represents member railroads in multi-employer collective bargaining under the Railway Labor Act, as well as in regard to other labor relations matters of concern to the railroad industry generally. In addition, the NRLC advises and assists its member railroads in connection with Railway Labor Act arbitration of minor disputes arising out of workplace grievances or the interpretation or application of collective bargaining agreements.

The NRLC has recently urged the Court to grant certiorari in other pending cases that raise questions as to the lawfulness of strikes and the validity of union demands for bargaining over labor protection in connection with ICC-approved line sales subject to imposition of labor protection under § 10901 of the Interstate Commerce Act.[5] Those cases present questions as to the proper accommodation between the contrary mandates of the Interstate Commerce Act on the one hand and the Railway Labor Act and the Norris-LaGuardia Act on the other, over which the lower courts are in conflict and which this Court has not addressed.

This case, as RLEA points out, "differs" from other pending line sale cases because the court of appeals did not address any question under the Interstate Commerce Act or as to the relation of that Act's labor protection provisions to the other labor statutes that apply to the railroad industry. (Pet. at 14). Indeed, the court of appeals explicitly declined to reach such questions because it found "a full and proper basis for affirming the district court" in well-settled Railway Labor Act law as to the arbitrability of minor disputes over the interpretation or application of labor agreements. (*Id.* at 21a & n.6, 20a n.4). RLEA's petition in this case raises only a Railway Labor Act question, challenging the established rule that whether such an arbitrable dispute is presented in a strike or status quo case depends on whether a carrier's contractual justification for its challenged actions is at least arguably correct. (Pet. at i).

The disposition of the question presented here under the Railway Labor Act can have no bearing on the merits of the Interstate Commerce Act questions before the

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[5] Brief for the National Railway Labor Conference as *Amicus Curiae* in Support of the Petition in *Pittsburgh & Lake Erie R.R.* v. *RLEA*, No. 87-1888; Brief for the National Railway Labor Conference as *Amicus Curiae* in Support of the Petition in *Pittsburgh & Lake Erie R.R.* v. *RLEA*, No. 87-1589.

Court in the other pending line sale cases. Nor will the ultimate result in this case obviate, as a practical matter, the necessity for this Court to resolve the conflict among the circuit courts of appeals as to the Interstate Commerce Act questions which, as we have explained in our briefs in support of certiorari in the two *Pittsburgh & Lake Erie* cases, threatens to halt the revitalization of the industry through sales of marginal or otherwise abandonable lines to new operators. Not all selling carriers will be in a position to rely on their collective bargaining agreements in implementing the effects of these sales on employees—indeed, the Pittsburgh & Lake Erie Railroad made no minor dispute argument in the cases now pending before the Court. Regardless of the result in this case, the controversy over the effect of the Interstate Commerce Act on other labor laws will remain live and divisive, and will require resolution by this Court. Thus, we submit, granting the petition in this case will not aid the Court in disposing of the *Pittsburgh & Lake Erie* cases and other pending cases that present Interstate Commerce Act accommodation questions.

NRLC opposes the petition for certiorari in this case. RLEA's petition concededly seeks a radical departure from the now well-settled law governing the arbitrability of minor disputes over the interpretation and application of labor agreements (Pet. at 19), which the courts of appeals have unanimously applied, and which this Court has often addressed. RLEA contends that the courts have jurisdiction to "examine the merits of a rail carrier's reliance on collective bargaining agreements" in cases where unions opt to challenge alleged departures from such agreements as status quo violations, either by striking or by suing for injunctive relief. (Pet. at i). RLEA is not likely to prevail on that contention. It is contrary to the Railway Labor Act's express provision for arbitration of minor disputes by the adjustment boards, to this Court's frequent admonitions that the boards' jurisdic-

tion is "exclusive," [6] and to the strong "federal policy favoring arbitration of labor disputes" generally,[7] and RLEA's proffered new rule would destabilize labor relations in this vital national industry by encouraging litigation and strikes over workplace grievances which arise daily and now are committed to arbitration. The only effect that would ensue if the petition were granted would be to create uncertainty in what has heretofore been settled law while this Court reconsiders the question whether the jurisdiction of adjustment boards over minor disputes is exclusive—a question it has repeatedly answered affirmatively—thus undercutting in the interim the ability of railroads to rely on bargained-for rights and benefits under their collective bargaining agreements when making changes that are essential to their operations. Preventing such injurious uncertainty is of paramount interest to the NRLC and its member railroads.

ARGUMENT

The Decision Below Rests on the Incontrovertible and Well-Settled Rule That Disputes over the Interpretation of Labor Agreements Are for Arbitrators, Not the Courts, Which Is Essential to Stable Labor Relations in the Railroad Industry

Under the Railway Labor Act, major disputes under §§ 2 Seventh and 6 of the Act and minor disputes under § 3 of the Act "are sharply distinguished," both "substantively and procedurally," as this Court first recognized in *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 722 (1945). Major disputes arise from efforts to "secure" or "change the terms of" collective bargaining agree-

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[6] *E.g., Andrews* v. *Louisville & N. R. Co.*, 406 U.S. 320, 325 (1972); *Locomotive Engineers* v. *Louisville & N. R. Co.*, 373 U.S. 33, 38 (1963); *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239, 244 (1950).

[7] *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 377 (1974).

ments, where "therefore the issue is not whether an existing agreement controls the controversy." They "look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past." *Id.* at 723. If the parties cannot reach agreement in a major dispute, the union may strike. *Id.* at 725. Minor disputes, by contrast, relate "either to the meaning or proper application of a particular provision" of an existing agreement "with reference to a specific situation or to an omitted case." That is, they involve claims "to rights accrued, not merely to have new ones created for the future." *Id.* at 723. Minor disputes are committed to compulsory arbitration by adjustment boards under § 3 of the Act. *Id.* at 727-28. Strikes over minor disputes are unlawful and may be enjoined. *Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30 (1957).

This Court has held time and again that the adjustment boards' jurisdiction over minor disputes is "exclusive,"[8] and has specifically held that "Congress considered it essential to keep * * * 'minor' disputes within the Adjustment Board and out of the courts." *Union Pacific R. Co.* v. *Sheehan*, 439 U.S. 89, 94 (1978).[9] That conclusion follows directly from the Act's fundamental purpose of promoting "stability in labor-management relations in this important national industry." *Id.*; see 45 U.S.C. § 151a. The system of "internal government" under

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[8] *E.g.*, *Andrews* v. *Louisville & N. R. Co.*, 406 U.S. 320, 325 (1972); *Locomotive Engineers* v. *Louisville & N. R. Co.*, 373 U.S. 33, 38 (1963); *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239, 244 (1950).

[9] See also, *e.g.*, *Order of Conductors* v. *Pitney*, 326 U.S. 561, 566 (1946) (Congress "intended to leave minimum responsibility to the courts" under the Railway Labor Act); *General Committee* v. *M.-K.-T. R. Co.*, 320 U.S. 323, 333 (1943) ("The inference is strong that [in the Railway Labor Act] Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate.").

§ 3 of the Act[10] was designed "to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers" as to the proper interpretation and application of collective bargaining agreements, express and implied,[11] to place such grievances in the hands of expert arbitrators versed in the railroad industry's customs and practices,[12] and ultimately to minimize conflicts between labor and management leading to interruptions of transportation services.[13] The Railway Labor Act thus expresses by statutory mandate the strong "federal policy favoring arbitration of labor disputes" that this Court has held applies even where, as under the National Labor Relations Act, arbitration is mandatory only if the parties agree to it. *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 377 (1974).

Under the Railway Labor Act, it frequently happens, as it did in this case, that labor will challenge action by a carrier that the carrier believes is authorized under existing agreements, and the parties will disagree as to whether the resulting dispute is major or minor. In such cases, the carrier will contend that the change it has made or proposes making is authorized under its existing agreements and thus that any union challenge can present only a minor dispute. The union will contend that the carrier's action is an unauthorized departure from the status quo that gives rise to a major dispute. Every court of appeals that has been presented with such a case has recognized, as the court of appeals did in this case, that the "status quo" includes the carrier's rights

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[10] *Pennsylvania R. Co.* v. *Day*, 360 U.S. 548, 552 (1959).

[11] *Union Pacific R. Co.* v. *Sheehan*, *supra*, 439 U.S. at 94; see 45 U.S.C. § 151a(5).

[12] *Gunther* v. *San Diego & A.E. R. Co.*, 382 U.S. 257, 261 (1965); *Order of Conductors* v. *Pitney*, *supra*, 326 U.S. at 566-67.

[13] *Slocum*, *supra*, 339 U.S. at 242; *Union Pacific R. Co.* v. *Price*, 360 U.S. 601, 609 (1959).

under existing agreements,[14] and has held that the dispute is minor if the carrier's position under its agreements is at least "arguable," or is not "frivolous" or "obviously insubstantial." [15]

RLEA attacks this uniform approach on two bases, both of which are irreconcilable with the Act's provisions and with applicable decisions of this Court:

1. First, RLEA contends that, at least in cases where unions have served § 6 notices seeking to change the existing agreements, the courts' power to enforce the status quo under § 6 gives them jurisdiction to determine "what working conditions constitute the status quo," and to disregard the carriers' rights under existing agreements in making that determination. (Pet. at 26). According to RLEA, that follows from this Court's decision in *Shore Line* v. *Transportation Union*, 396 U.S. 142 (1969). In *Shore Line*, the Court rejected a carrier's contention that its obligation under § 6 to maintain unchanged the "working conditions" in effect when a § 6 service was served until major dispute procedures are

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[14] See, *e.g.*, *RLEA* v. *Boston & Maine Corp.*, 808 F.2d 150, 156 (1st Cir. 1986); *Baker* v. *United Transp. Union*, 455 F.2d 149, 157 (3d Cir. 1971); *United Transp. Union* v. *St. Paul Union Depot Co.*, 434 F.2d 220, 223 (8th Cir. 1970).

[15] In addition to the decision below, see, *e.g.*, *Air Line Pilots Ass'n* v. *Eastern Air Lines*, Nos. 88-7201 - 88-2074 (D.C. Cir. Sept. 30, 1988); *Maine Central R.R.* v. *United Transp. Union*, 787 F.2d 780 (1st Cir. 1986); *Baylis* v. *Marriott Corp.*, 843 F.2d 658, 663 (2d Cir. 1988); *Goclowski* v. *Penn Central Transp. Co.*, 571 F.2d 747, 755 n.11 (3d Cir. 1977); *Dement* v. *Richmond, F. & P. R.R.*, 845 F.2d 451, 463 (4th Cir. 1988); *Railway Exp. Agency, Inc.* v. *Brotherhood of Ry., Airline & S.S. Clerks*, 437 F.2d 388, 392 (5th Cir. 1972); *Brotherhood of Loc. Engineers* v. *Consolidated Rail Corp.*, 844 F.2d 1218, 1221 (6th Cir. 1988); *International Ass'n of Machinists* v. *Soo Line R.R.*, 850 F.2d 368, 376-77 (8th Cir. 1988) (*en banc*); *Brotherhood of Loc. Engineers* v. *Burlington N. R.R.*, 838 F.2d 1102, 1105 (9th Cir. 1988). *Cf. Paperworkers* v. *Misco*, 108 S.Ct. 364, 371 (1987).

exhausted extended only to those working conditions expressly provided for in written agreements, and held that the status quo includes all "actual, objective working conditions and practices broadly conceived." 396 U.S. at 143, 153.

But *Shore Line* did not hold that the carrier's rights under existing agreements are nullified by the status quo obligation triggered by a union's § 6 notice, as RLEA contends. On the contrary, the Court was at pains to note that, even though the written agreements did not address the carrier's right to make the changes in work assignments that the union challenged, the fact that a § 6 notice was pending "would not have barred the railroad from ordering the assignments * * * if, apart from the [written] agreement, such assignments had occurred for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions." 396 U.S. at 153-54.[16] RLEA's view of the Act's status quo provisions as instruments of destruction of established contractual rights, rather than their preservation, far from being supported by *Shore Line*, is directly contrary to that decision, and to the Act itself, which seeks to "maintain agreements," not to nullify them. See 45 U.S.C. § 152 First.

2. Second, RLEA contends that, even if a carrier's agreements are relevant in a status quo case, the uniform standard being applied by the courts of appeals, which looks only to whether the carrier's justification for its

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[16] "[T]he practices of the industry and the shop [are] equally a part of the collective bargaining agreement although not expressed in it," as this Court noted in a case arising under the National Labor Relations Act. *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960). The axiomatic rule that such established past practices are part of the implied agreement of the parties (see Restatement (Second) of Contracts § 223 (1981)) is equally applicable under the Railway Labor Act. See, *e.g.*, *Transportation Union* v. *U.P.R. Co.*, 385 U.S. 157, 161 (1966); *Brotherhood of Maintenance of Way Employees* v. *Chicago & N.W. Transp. Co.*, 827 F.2d 330, 334 (8th Cir. 1987).

actions under its agreements is at least "arguable," is unduly "myopic." (Pet. at 19). According to RLEA, the courts should have the power to "examine the merits of a rail carrier's reliance on collective bargaining agreements and past practice" in status quo cases, since it is up to the courts to enforce the status quo. (Pet. at i, 22). That contention is untenable, because the uniform standard is the only permissible one under the Act. If a carrier's claim of contractual justification for a challenged action is arguably correct and cannot be dismissed as "frivolous" or "obviously insubstantial," then a question as to the proper interpretation of the agreements is presented. That is precisely the type of question that the adjustment boards were created to resolve—the "interpretation or application" of labor agreements, 45 U.S.C. § 153 First (i)—and that Congress intended to keep "out of the courts." *Union Pacific* v. *Sheehan*, *supra*, 439 U.S. at 94. This Court recognized that in *Pitney*, *supra*, holding that where a carrier's defense to a § 6 or § 2 Seventh claim puts the meaning of its labor agreements into issue, the court must stay its hand until "after the Adjustment Board acts * * *." 326 U.S. at 565-67.[17] If courts in status quo cases took any harder look after determining that a question of contract interpretation is presented, they would unquestionably be poaching on the statutory preserve of the adjustment boards.

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[17] In the later *Shore Line* case, the carrier did not contend that its existing agreements authorized it to make the challenged changes, and so there was no occasion for this Court to address the question presented in this case, and in *Pitney*, *i.e.*, whether, if such a contention had been made and contested by the union, the court could have proceeded to decide it. *Shore Line* did not, thus, overrule *Pitney*, and indeed *Shore Line* reaffirmed the holding in *Pitney* that where the question whether a carrier's unilateral action violates the status quo depends on the parties' rights under existing agreements, "the proper forum for interpreting the agreements [is] the Adjustment Board provided by Congress in the Railway Labor Act, § 3 First (i), for that purpose * * *." 396 U.S. at 156-57.

A rule that would classify disputes as minor or major not according to whether they are, in fact, disputes over the interpretation of agreements, but according to the means by which rail labor chooses to challenge carrier actions, would thus obliterate the distinction between major and minor disputes for all practical purposes. Rail labor, at its option, could bring any minor dispute to court, simply by claiming that what it perceives as a carrier's departure from existing agreements violates the status quo under §§ 2 Seventh or 6, and either suing for a status quo injunction or striking and compelling the carrier to come to court for relief. In either case, the court would be free to decide the merits of the parties' respective positions on the agreements, thus eliminating any role for the adjustment board in the dispute.

If that were the rule, Congress' purpose in creating the adjustment boards in the first instance—to promote stable labor relations in the railroad industry and avoid interruptions to commerce—would be nullified. Unions would have every incentive to strike or sue in opposition to carrier actions; labor and management would be locked in battle, either in the streets or in the courts, over minor disputes, rather than attempting to adjust them amicably and submitting them to arbitration by "a tribunal consisting of workers and management to secure * * * prompt, orderly, and final settlement * * *," as Congress intended. *Union Pacific* v. *Sheehan*, *supra*, 439 U.S. at 94. And justifiable expectations under labor contracts could be set at naught, for carriers could be enjoined from acting, or subjected to strikes, or unions enjoined from striking, on the basis of contract interpretations by the courts, which this Court has recognized are singularly unsuited for such a task.[18]

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[18] "[T]he industrial common law—the practices of the industry and the shop—is * * * a part of the collective bargaining agreement although not expressed in it. The labor arbitrator

Nothing in the Act warrants such a chaotic result. Nothing in this Court's decisions supports it, and indeed they are squarely to the contrary. The Court has held that arbitration of minor disputes is not optional, as RLEA contends, but is "compulsory." *Chicago R. & I., supra*, 353 U.S. at 34, 39; see *Elgin, supra*, 325 at 727-28. It has held in an unbroken line of cases that the Board's jurisdiction in that regard is exclusive. Every court of appeals that has been presented with the question has heeded that admonition, and has accepted the same standard applied by the court of appeals in this case for protecting the exclusivity of the Act's arbitration remedies by ensuring that minor disputes are not brought to court under the guise of status quo claims. Nothing in RLEA's petition suggests any basis for reviewing that well-settled law, much less for overruling the decisions of all those courts, and still less for overruling the numerous decisions of this Court, from *Elgin* down to *Sheehan*, that would have to be overruled in whole or in part to reach that result.

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is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract. * * * The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed." *Warrior & Gulf, supra*, 363 U.S. at 581-582.

That observation, made in a National Labor Relations Act case, applies with even greater force under the Railway Labor Act. "From the point of view of industrial relations our railroads are largely a thing apart. * * * 'The railroad world is like a state within a state. Its population * * * has its own customs and its own vocabulary, and lives according to rules of its own making * * *.'" *Elgin, supra*, 325 U.S. at 751 (citations omitted); accord *Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 392 (1969). Adjustment boards are "peculiarly familiar with the thorny problems and the whole range of grievances that constantly exist in the railroad world." *Gunther, supra*, 382 U.S. at 261.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID P. LEE
Vice Chairman and General Counsel
National Railway Labor Conference
1901 L Street, N.W.
Washington, D.C. 20036
(202) 862-7000
Counsel of Record for Amicus Curiae

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Nos. 87-1589, 87-1888, 87-1911, 87-2049 and 88-464

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PITTSBURGH & LAKE ERIE RAILROAD COMPANY,
Petitioner,
v.
RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,
v.
GUILFORD TRANSPORTATION INDUSTRIES, INC., *et al.*,
Respondents.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,
v.
CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Courts of Appeals for the First, Third, Seventh and Eighth Circuits

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SUPPLEMENTAL BRIEF FOR RAILWAY LABOR EXECUTIVES' ASSOCIATION

WILLIAM G. MAHONEY
JOHN O'B. CLARKE, JR.*
HIGHSAW & MAHONEY, P.C.
Suite 210
1050 17th Street, N.W.
Washington, D.C. 20036
Attorneys for Railway Labor Executives' Association

Date: November 18, 1988 * Counsel of Record

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On Petitions for Writs of Certiorari to the United States Courts of Appeals for the First, Third, Seventh and Eighth Circuits

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SUPPLEMENTAL BRIEF FOR RAILWAY LABOR EXECUTIVES' ASSOCIATION

This supplemental brief is respectfully submitted by the Railway Labor Executives' Association [hereinafter, "RLEA"], pursuant to Rule 22.6 of the Rules of this Court, to present an overview of the pending petitions,

and in response to certain arguments made by the United States as an *amicus curiae* in Nos. 87-1589 and 87-1888, *Pittsburgh & Lake Erie R.R. v. RLEA*. This brief is also being submitted to bring to this Court's attention certain recent developments affecting No. 87-1911, *RLEA v. Guilford Transportation Industries, Inc.*

1. OVERVIEW OF PENDING CASES

Since March 24, 1988, when the petition for a writ of certiorari was filed in No. 87-1589, *Pittsburgh & Lake Erie R.R. v. RLEA*, a total of eight (8) petitions have been filed with this Court seeking writs of certiorari for this Court to review various issues arising from the rail industry's reliance upon the powers of the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] over rail financial transactions, to assert that the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, relieves our nation's railroads of their bargaining and status quo obligations under the Railway Labor Act, 45 U.S.C. § 151, *et seq.* While those petitions raise many different issues, RLEA, which is a party to each case, submits that the cases may be grouped into the following four categories by the issues which they present.

A. Collateral Attack Issues

Although the railroads have asserted throughout this litigation that the Interstate Commerce Act operates to relieve them of any "overlapping" obligation under the Railway Labor Act, the courts first relied upon the collateral attack concept to deny rail labor's efforts to enforce the Railway Labor Act's notice, bargaining and status quo commands. *E.g., RLEA v. Staten Island R.R.*, 792 F.2d 7 (2d Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987). That collateral attack issue is currently before this Court in five (5) of the eight petitions: No. 87-1888, *Pittsburgh & Lake Erie R.R. v. RLEA*; No. 87-1911, *RLEA v. Guilford Transportation Industries, Inc.*; No. 87-2049, *RLEA v. Chicago & North Western Transpor-*

tation Co.; No. 88-217, *ICC v. Pittsburgh & Lake Erie R.R.*; and No. 88-517, *City of Galveston v. RLEA.*

Of those five cases, RLEA submits that the *Guilford* case presents the best vehicle, for *Guilford* presents the collateral attack issue in a factual situation where the ICC imposed employee protections which the carriers asserted specifically authorized them to consummate the leases, notwithstanding the bargaining and status quo commands of the Railway Labor Act. *See, BLE v. Boston and Maine Corp.*, 788 F.2d 794, 800-01 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986). This case, therefore, presents not only the general collateral attack issue which arises when rail labor seeks to enforce the Railway Labor Act in cases involving ICC orders exempting a financial transaction, but the additional question of whether the imposition of employee protections requires a different result. This additional issue is highly relevant because some courts have relied upon the presence of ICC imposed protective conditions to conclude that enforcement of the Railway Labor Act's major dispute resolution processes would constitute a collateral attack on an ICC decision imposing specific conditions to protect employee interests. *BLE v. Boston and Maine Corp.*, *supra*, 788 F.2d at 800-02; *see*, ICC Pet. in No. 88-711 at 14-15. Thus, if this Court resolves the collateral attack issue presented by the pending petitions in a manner favorable to rail labor, but in a case in which employee protections were not imposed by the ICC, it is safe to assume that the ICC will then impose some minimal form of protection, such as the limited buyout offer involved in No. 88-464, *RLEA v. Chicago & North Western Transportation Co.*, and the courts will then be faced with the question of whether that fact makes enforcement of the Railway Labor Act a collateral attack on that ICC order.

In short, since the goal which the parties to the pending petitions are attempting to obtain is the final reso-

lution of as many vexing issues as possible, RLEA respectfully submits that *Guilford* should be one of the cases accepted for review.

In its brief to this Court as an *amicus* in Nos. 87-1589 and 87-1888, however, the United States asserts that it disagrees with RLEA that the *Guilford* case should be used as a vehicle to resolve any of the pending issues. U.S. Brief at 9 n.8. The United States takes that position because it assumes that the transactions in *Guilford* are subject to the express immunity granted by 49 U.S.C. § 11341(a) that, according to the Solicitor General, relieves a carrier participating in such "approved or exempted" transactions from any restraining or prohibitory law. *Id.* As the United States concludes: "Thus, the principles that govern transactions subject to Section 11341 are not necessarily applicable to transactions subject to Section 10901 and the *Ex Parte No. 392* class exemption." *Id.*

In asserting that Section 11341(a) applies to the lease *exemptions* involved in *Guilford*, the United States ignores the fact that Section 11341(a), by its express terms, applies only to "transaction[s] approved by or exempted by the Commission under this subchapter [*i.e.*, Sections 11341 to 11351] . . . ." 49 U.S.C. § 11341(a). Rail exemptions, such as those involved in *Guilford*, are granted under Section 10505, a section which is in an entirely different subchapter of the transportation statute. Moreover, as RLEA pointed out in its petition in No. 87-1911 (Pet. at 22-23), the import of the clear language of Section 11341(a) is supported by that section's legislative history, and by the ICC's holding in *Ex Parte No. 282 (Sub-No. 9), Railroad Consolidation Procedures—Trackage Rights Exemption*, 1 I.C.C.2d 270, 279 (1985), that: "[S]ection 11341(a) does not apply to the [Section 11343(a)] transactions exempted" under Section 10505.

Once it is accepted that Section 11341(a) does not apply to the lease exemptions in *Guilford*, that case then

presents the same collateral attack and conflict of laws issues as are involved in the other cases, except, as explained above, it has the additional feature of the impact of ICC imposed protections on both issues. Therefore, RLEA submits, Guilford should be used as one of the vehicles to resolve both the collateral attack and conflict of laws issues.

RLEA recognizes, however, that the possibility exists that this Court may not agree with RLEA's view of the law on the collateral attack issue, and therefore, RLEA agrees with the rail industry that at least one of the other pending collateral attack cases should also be accepted for review in the event that this Court concludes that the presence of employee protective provisions requires a different result than RLEA is advocating. As we have explained before, RLEA submits that its petition in No. 87-2049, *RLEA v. Chicago & North Western Transportation Co.*, should be that additional vehicle.

No. 87-1888 also presents a good vehicle for the non-employee protection collateral attack issue, but it suffers from one major defect.[1] Rail labor has been involved in negotiations with the Pittsburgh & Lake Erie Railroad [hereinafter, "P&LE"] and its creditors in an attempt to find a solution to the carriers' financial plight. So far, those negotiations have been unsuccessful. However, as shown by the letter to counsel for RLEA from RLEA's financial advisor, Mr. Brian M. Freeman, which has been lodged with this Court, it is possible that those efforts will be successful in the near future. A successful resolution of the current negotiations may include as part of the agreement the commitment of all parties (including RLEA and the P&LE) to dismiss "with prejudice" "all

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[1] As explained below, RLEA's hesitancy to recommend the grant of the petition in No. 87-1888 lies in the possibility that the parties may agree to settle before this Court reaches a decision on the merits. That possibility, however, is far from a certainty, and, thus, this Court may wish to grant the petition in No. 87-1888, as well, for concurrent briefing with Nos. 87-1911, 87-2049, and 88-464.

actions brought by Rail [*sic*] Labor Executives' Association ('RLEA') against PLE relating to the sale of PLE's assets . . . ." Freeman letter dated November 14, 1988 at attachment, p. 9, ¶(g).

It was for this reason that RLEA stated in its response to the P&LE's petition in No. 87-1888, that "there is a substantial question as to whether this case will still present a justiciable issue later this year or early next year." RLEA Brief in No. 87-1888 at 5.[2] While RLEA continues to question whether this case will remain viable, we agree that it is currently justiciable. However, while RLEA has a clear interest in continuing to press the validity of the Third Circuit's decision, RLEA also has an obligation to the P&LE rail employees which may require it to agree to dismiss its underlying complaint as a condition for an overall settlement. That same possibility does not exist in No. 87-2049 or in No. 87-1911.

In short, on the collateral attack issue, RLEA suggests that this Court grant the petitions in Nos. 87-1911 and 87-2049, and that this Court hold Nos. 87-1888 and 88-517 in abeyance. *But see*, note 1, *supra*. RLEA continues to maintain that No. 88-217 should be denied.

B. Conflict Of Laws Issues

RLEA respectfully submits that the issue which lies at the heart of the pending cases, although it is not presented in each petition, is the question of whether the Interstate Commerce Act supersedes the Railway Labor Act. That issue is squarely presented by five of the peti-

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[2] In its brief (U.S. Brief at 9 n.8), the United States asserts that RLEA has suggested that No. 87-1888 may become moot because the P&LE no longer intends to sell to its original prospective purchaser, P&LE Railco, Inc. That assertion is incorrect, for RLEA has contended before, and continues to assert, that this case (No. 87-1888) will not be moot so long as the P&LE may sell its assets before it has completed the Railway Labor Act's major dispute resolution processes. *See, RLEA v. P&LE*, 845 F.2d 420, 427-28 n.8 (3rd Cir. 1988), *pets. for cert. pending*, Nos. 87-1888 and 88-217.

tions: No. 87-1888, *P&LE v. RLEA*; No. 87-1911, *RLEA v. Guilford*; No. 87-2049, *RLEA v. Chicago & North Western*; No. 88-217, *ICC v. P&LE*; and No. 88-711, *ICC v. UTU*. Of those five cases, Nos. 88-217 and 88-711 do not merit review by this Court since the ICC, which is the petitioner in both, lacks standing. Of the remaining three, RLEA again suggests that Nos. 87-1911 and 87-2049 be used as the test vehicles.

C. Railway Labor Act Issues

Running throughout virtually all of these cases is the question of what specific Railway Labor Act obligations are presented and believed by the rail carriers to be in conflict with the Interstate Commerce Act. Only two of the pending cases, besides the ICC's petition in No. 88-217, present that question: No. 87-1888, *P&LE v. RLEA*, and No. 88-464, *RLEA v. Chicago & North Western Transportation Company*. However, a primary distinction between those two cases is that the *Chicago & North Western* case deals with a sale of part of a railroad, and thus, does not present the same bargaining issue which arises from the fact that the *P&LE* case involves a railroad's attempt to go completely out of the railroad business.[3] While RLEA submits that this fact should not make any difference, the Seventh Circuit in the *Chicago & North Western* case concluded that this was a distinguishing factor. *See*, No. 88-464, Pet. at 16a-17a n.3. Thus, if this Court is to resolve as many issues as possible so that rail labor and management will know what their rights are in line sale cases, this Court should grant the petition in No. 88-464.

Another reason for granting the petition in No. 88-464 is that this case is the only one of the eight petitions which squarely presents the recently prevalent "minor

[3] It should be noted that the P&LE did not intend to dissolve, but simply to sell its rail lines and facilities and remain viable as a rail car leasing and real estate entity.

dispute" question. Since the contractual provisions upon which the C&NW relied in No. 88-464 to argue that the underlying controversy was a minor dispute, are common contractual provisions throughout the entire rail industry (*see*, RLEA Reply Brief in No. 88-464 at 6 n.1), it stands to reason that other carriers will advance an identical minor dispute defense in line sale cases. Indeed, this has already occurred, for in the two remaining district court cases arising from line sales, the carriers have raised that identical argument. One case is still pending, *RLEA v. Burlington Northern R.R.*, W.D.Mo. Civil Action No. 87-0696-CV-W-8, but in the other, the court relied upon the Seventh Circuit's *Chicago & North Western* decision to conclude that rail labor's claims raised only a minor dispute, even though Section 6 notices had been served by several unions. *Atchison, Topeka & Santa Fe Ry. v. RLEA*, N.D.Ill Civil Action Nos. 87 C 9847 and 87 C 9969, decided October 25, 1988.

A resolution of the question presented as to the scope of the status quo obligation is important to the conflict of laws issue. This is so because, obviously a conclusion that a carrier has an obligation to bargain over the effects of a sale on its employees, but that it is not precluded by the Act's status quo obligation from selling during that bargaining process, presents a different conflict issue than would be presented by the conclusion that the status quo obligation *does* preclude the sale before that bargaining is completed. Since No. 88-464 presents this issue, RLEA submits that the writ should be granted in that case.

D. Norris-LaGuardia Act Issue

Two of the pending cases present the additional issue of the relationship between the Interstate Commerce Act and the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.* Those cases are: No. 87-1589, *P&LE v. RLEA*, and No. 88-711, *ICC v. UTU*. One of those cases, *ICC v. UTU*, does not present a case over which this Court has juris-

diction, and the other case suffers from the possible settlement problems inherent in No. 87-1888. RLEA has previously suggested that this Court hold No. 87-1589 in abeyance, and it continues to make that suggestion for the reasons set forth in its response to No. 87-1589.

2. RECENT EVENTS AFFECTING NO. 87-1911

In its earlier supplemental briefs in No. 87-1911, RLEA informed this Court that on June 12, 1988, an arbitrator issued an award which may affect the continued justiciability of No. 87-1911. That award—the Implementing Agreement award—is the subject of a review petition before the ICC. On November 15, 1988, the ICC conducted a public voting conference on that petition, and three of the five Commissioners voted to set aside that award insofar as it required the Springfield Terminal Railway Company to apply the rates of pay and work rules of the lessor carriers to the employees operating the leased lines. According to the statements made by the Commissioners at the voting conference,[4] they voted to set aside that portion of the award because the arbitrator's award limited the "management flexibility" which Guilford had hoped to achieve by the leases. As RLEA explained in its Supplemental Brief of September 30, 1988, at 4-5, that management flexibility was to be achieved through the abrogation of the lessors' collective bargaining agreements. However, rather than impose the Springfield Terminal work rules, the ICC voted to require the parties to negotiate, with the arbitrator acting as a mediator, the issue of the proper construction of the Springfield Terminal-United Transportation Union collective bargaining agreement, and the issue of what work rules should govern the lease operations. If the parties are unable to agree, then the "arbitrator"

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[4] RLEA has ordered a transcript of the voting conference and once it is obtained (at present, it is scheduled to be delivered on Monday, November 21, 1988), RLEA will lodge it with this Court.

is to submit to the Commission a recommended decision on those issues which the ICC will then review to devise the new collective bargaining "agreement." RLEA recognizes, however, that the full import of what the Commission will order in that case will not be known until it issues it written decision and order.

CONCLUSION

For the reasons set forth in RLEA's earlier pleadings, RLEA respectfully submits that this Court should grant the petitions in Nos. 87-1911, 87-2049 and 88-464.

Respectfully submitted,

WILLIAM G. MAHONEY
JOHN O'B. CLARKE, JR.*
HIGHSAW & MAHONEY, P.C.
Suite 210
1050 17th Street, N.W.
Washington, D.C. 20036
Attorneys for Railway Labor Executives' Association

Date: November 18, 1988

* Counsel of Record

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Respondents.

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REPLY BRIEF FOR PETITIONERS

WILLIAM G. MAHONEY
JOHN O'B. CLARKE, JR.*
HIGHSAW & MAHONEY, P.C.
Suite 210
1050 17th Street, N.W.
Washington, D.C. 20036
Attorneys for Petitioners Railway Labor Executives' Association, et al.

Date: November 17, 1988

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-464

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY, FRVR CORPORATION, and the INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONERS

This reply brief is respectfully submitted by petitioner Railway Labor Executives' Association [hereinafter, "RLEA"] and the fourteen (14) individual labor organizations in response to the joint brief by respondents Chicago & North Western Transportation Company [hereinafter, "C&NW"] and FRVR Corporation in opposition to this petition, and in response to statements made by the United States as an *amicus curiae* in Nos. 87-1589 and 87-1888, *Pittsburgh & Lake Erie R.R. v. RLEA*, concerning the issues raised by this case.

I. Contrary To Respondents' Assertions, The Status Quo Question Presented By This Case Is Not Settled, But Rather Involves An Issue Which The United States, As An *Amicus Curiae* In No. 87-1888, Has Argued Warrants Review By This Court

Respondents and the lower courts in this case have viewed the issue presented by rail labor's claim that the Railway Labor Act's status quo obligation prohibited the C&NW from selling the Duck Creek South lines until after it had bargained, as presenting a major-minor dispute classification issue. Respondents continue to press that classification assertion before this Court. Indeed, they do so even though they have also conceded in their brief in opposition to this petition that rail labor has served Section 6 notices to bargain for agreements to deal with the impact of the proposed sale on employees and that the "only question" addressed by the Seventh Circuit concerned "the scope of the 'status quo' pending bargaining, given C&NW's claim that the force-reduction provisions in existing agreements authorize" the job abolishments. Resp. Brief at 24. Contrary to respondents' assertions, the application of the major-minor dispute classification standard to disputes over what working conditions must be preserved as part of the "actual, objective working conditions," is not accepted by all of the circuits which have addressed this issue, and indeed, as petitioners have submitted, is in conflict with the decision of this Court in *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142 (1969). Moreover, respondents' arguments as to the scope of the Act's status quo obligation present the very issue which the United States, as an *amicus curiae* in Nos. 87-1589 and 87-1888, *Pittsburgh & Lake Erie R.R. v. RLEA*, asserted "may have far-reaching consequences for labor-management relations in the railroad and airline industry [*sic*] and warrants this Court's review." U.S. Brief in Nos. 87-1589 and 87-1888 at 17.

What respondents have done throughout this litigation is to rely upon the exclusive jurisdiction of adjustment boards over the resolution of minor disputes to assert that federal courts do not have jurisdiction to resolve the merits of C&NW's claim that it has a contractual right to take certain actions either before or during the status quo period. By using this approach, respondents have been successful in having the lower courts classify as a "minor dispute," not only rail labor's claim that the C&NW had an obligation under Section 2 Seventh of the Act, 45 U.S.C. § 152 Seventh, to serve its own notice under Section 6 of the Act, 45 U.S.C. § 156, but also rail labor's alternative assertion that the Act's status quo obligation, which was triggered once rail labor served their own Section 6 notices, precluded the sale. Those two contentions by rail labor, however, are independent of each other, and raise distinct issues which respondents have collapsed into one.

Rail labor's first argument in support of its unsuccessful injunctive request, was that the proposed sale would change existing working conditions as embodied in agreements, and, thus, the C&NW was required by Section 2 Seventh of the Act to give notice under Section 6 and to bargain for an agreement. That notice, of course, would trigger the Act's status quo obligation which, in turn, would have required the C&NW to "preserve and maintain unchanged those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute." *Detroit & Toledo*, 396 U.S. at 153. It is usually in connection with a carrier's assertion that the dispute does not involve a change in working conditions that the major-minor classification standard has been applied. *E.g.*, *UTU v. Burlington Northern, Inc.*, 458 F.2d 354, 356 (8th Cir. 1972).

However, rail labor's second argument below raised different issues, for petitioners argued that once they served their own Section 6 notices, those notices triggered the Act's status quo requirement which then froze the existing working conditions. That question raises issues as to both the scope of the status quo and the identity of the forum which is to resolve disputes over that scope. Contrary to respondents' assertions, those issues, including whether the major-minor classification standard even applies, are not settled. *Compare, UTU v. Illinois Terminal R.R.*, 471 F.2d 375 (7th Cir. 1972), *with, Rutland Ry. v. BLE*, 307 F.2d 21 (2d Cir. 1962), *cert denied*, 372 U.S. 954 (1963).

For example, in the recently issued printed slip opinion in *ALPA v. Eastern Air Lines, Inc.*, D.C. Cir. Nos. 88-7201, 88-7202 and 88-7203, decided September 30, 1988 (printed slip op. issued October 28, 1988), the United States Court of Appeals for the District of Columbia Circuit asserted that there was a conflict among the circuits as to whether the filing of a Section 6 notice and the expiration of the ~~status quo~~ contract period made any dispute automatically major (Slip op. at 14), and it refused to adopt what it believed was the erroneous view of the Ninth and Second Circuits. *Id.* at 14-19. While petitioners submit that the District of Columbia Circuit misconstrued the import of the decisions on which it relied, the point remains that the circuits are not uniform on whether a dispute over what constitutes the status quo once a Section 6 notice has been served, can convert a major dispute into a minor dispute. In other words, the circuits are not in agreement as to whether the federal courts or the adjustment boards have jurisdiction to determine what "actual, objective working conditions" must be preserved during the Act's status quo period. *Compare, Air Cargo, Inc. v. Local 851, IBT*, 733 F.2d 241 (2d Cir. 1984).

That issue is presented by the first question posed by this petition and will require this Court to examine the scope of the status quo as expressed in *Detroit & Toledo*. This is so, petitioners submit, for respondents and the United States are asserting that the status quo obligation "does not prevent the carrier from taking actions that are authorized under the existing collective bargaining agreements." U.S. Brief at 15. Moreover, respondents and the United States go further and assert that the carrier may implement a disputed interpretation of its contractual rights during the status quo period. Resp. Brief at 18-19; U.S. Brief at 15 n.12. That argument, however, is contrary to this Court's holding in *Detroit & Toledo* that the status quo, which the Act requires be maintained, extends past the collective bargaining agreements, whether written or implied, and covers those "actual, objective working conditions and practices, *broadly conceived* . . . ." 396 U.S. at 153 (emphasis added). Indeed, respondents' and the United States' arguments are, in essence, a more restrictive variation of the position advanced by Justice Harlan in his dissent to *Detroit & Toledo* that the approach to determine the Act's status quo obligation should be a "subjective" one which examines "whether in the context of the relationship between the principals, taken as a whole, there is a basis for implying an understanding on the particular practice involved" (396 U.S. at 160 (Harlan, J., concurring and dissenting)), rather than the objective one adopted by this Court.

If, as petitioners assert, their view of the status quo is the correct rule of law, then the status quo obligation requires a carrier to maintain unchanged those actual, objective working conditions as they have been applied and interpreted prior to the service of the Section 6 notice. Thus, it logically follows that it is the federal courts, and not the adjustment boards, which are to determine what working conditions actually constitute the

status quo, for previously unasserted contractual rights are not part of the status quo. These issues as to scope and jurisdiction are obviously important to the rail and airline industries, and as the United States asserts with respect to the scope question, warrant review by this Court.

II. Respondents' Brief Shows The Urgent Need For This Court To Clarify The Proper Role Of Federal Courts In Rail Labor Disputes

Ignoring totally rail labor's main concern with the proposed sale (*i.e.*, the transfer of work opportunities), respondents center on the manner in which the C&NW's actions—*i.e.*, the abolishment of jobs—will affect employees once the sale is consummated, and assert that this case presents nothing more than a dispute over whether the C&NW has a "contractual justification" flowing from its reduction in force provisions to abolish jobs.[1] Such a question, they contend, is clearly for an adjustment board to resolve and, thus, this case does not present an issue of law which warrants review by this Court. Respondents also add that to accept rail labor's view of the role which federal courts should play in rail

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[1] Respondents' assertion that this case is unique because it involves the C&NW's reduction in force agreements and past practice, and thus, may not be applicable to other carriers (Resp. Brief at 25), is misleading, for reduction in force provisions are standard in the rail industry. Indeed, they are standard labor agreement provisions, for 91% of the contracts in manufacturing and non-manufacturing surveyed by the Bureau of National Affairs for its 1986 publication BASIC PATTERNS IN UNION CONTRACTS contained reduction in force provisions. More pertinent to this case, however, is the fact that the reduction in force provisions in the railroad industry are primarily the products of "national agreements" between most Class I rail carriers and the non-operating craft unions. For example, the C&NW's predecessor and most carriers in this nation entered into an agreement with eleven unions in 1962 to include a five day notice period in the reduction in force provisions. Agreement of June 5, 1962 (included in agreement files of the National Mediation Board).

labor disputes arising from line sales "would impose an intolerable burden on the federal courts, by substituting concurrent federal court jurisdiction for the adjustment boards' exclusive jurisdiction over thousands of minor disputes that arise each year." Resp. Brief at 19. Petitioners respectfully submit that those arguments are without merit and, indeed, the mere fact that respondents can make them shows the urgent need for this Court to clarify the proper role of federal courts in rail labor disputes where a railroad, in defending against a claim that it has ignored the major dispute resolution processes of the Railway Labor Act, raises no more than an arguable contractual justification to support a clear change in existing working conditions without any showing that the particular change was the subject of prior negotiations. *See, Detroit & Toledo, supra,* 396 U.S. at 160 (Harlan, J., concurring and dissenting).

Contrary to respondents' dire predictions, rail labor is not seeking to have federal courts exercise jurisdiction over "minor" disputes, for Congress has given adjustment boards under Section 3 of the Railway Labor Act exclusive jurisdiction to resolve disputes arising out of the interpretation or application of collective bargaining agreements in disputes involving the enforcement of individual contractual rights—*i.e.*, "minor disputes." *E.g., Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320, 325 (1972). Rather, petitioners, by their claim that the C&NW is required to give notice, are attempting to enforce the command of Section 2 Seventh of the Railway Labor Act, 45 U.S.C. § 152 Seventh, that no change may be made in "rates of pay, rules or working conditions, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of this Act." Disputes over such changes are classified as major, and are not to be resolved by compulsory arbitration. *E.g., Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 384 (1969). This case, peti-

tioners submit, shows that an expansive view of minor disputes can nullify the commands encompassed in Section 2 Seventh.

Respondents' response presents very vividly the problem which the rail industry is facing today in attempting to distinguish between the two classes of disputes by using the myopic classification standard applied by the courts below.[2] Here, the C&NW's claim that it had a contractual justification to take an action—*i.e.*, to abolish jobs—which results from the change—*i.e.*, the transfer of work opportunities to FRVR—has resulted in the courts classifying a clear change in working conditions as being a minor dispute which must be arbitrated. That conclusion is clearly an aberration of Congress' intent in enacting Section 3 of the Railway Labor Act in 1934, for while it is beyond question that Congress intended to give the adjustment boards exclusive jurisdiction over minor disputes, it is also clear that Congress, when it passed those amendments in 1934, did not intend to enact a form of compulsory arbitration of disputes over *changes* in existing working conditions. Indeed, as Commissioner Joseph B. Eastman explained in proposing what became Section 3 of the Act: "Please note that *disputes concerning changes* in rates of pay, rules, or working conditions may not be so referred [to adjustment boards], but are to be handled, when unadjusted, through the process of mediation." *Hearings on S. 3266, Before Senate Committee on Interstate Commerce*, 73rd Cong., 2d Sess. at 17

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[2] Respondents assert that rail labor never challenged this classification standard below, and thus should not be allowed to raise that issue before this Court. Resp. Brief at 14. That assertion is incorrect, for petitioners have consistently argued that it is improper to apply the classification standard to a status quo issue, and that it is impossible to classify a dispute over changes in existing working conditions as being a minor dispute, even if the carrier raises an arguable contract justification argument in defense of rail labor's suit seeking to enforce Section 2 Seventh of the Act. Transcript of oral argument before the District Court on March 14, 1988 at 82.

(1934) (testimony of Commissioner Eastman) (emphasis added).

Respondents' reliance on its reduction in force provisions cannot alter the fact that this case clearly involves a change in the working conditions of employees as embodied in agreements. At present, C&NW employees have seniority rights to perform the work which is currently being performed on or in connection with the Duck Creek South lines, but once the sale occurs, those seniority rights will no longer entitle C&NW employees to perform that work. This is so because the C&NW, by the sale, will have transferred to FRVR the job opportunities currently embodied within the C&NW employees' seniority rights. There are, however, no agreements which specifically cover this change in seniority rights, and, thus, what the Third Circuit said in *RLEA v. Pittsburgh & Lake Erie R.R.*, 845 F.2d 420, 428 (3rd Cir. 1988), *pets. for cert. pending*, Nos. 87-1888 and 88-217 (emphasis in original), is equally applicable here: The carrier "has proposed action which might not *violate* its agreements, yet it plainly would *change* the nature of those agreements."

When this dispute is viewed realistically, it is clear that this dispute involves a change in existing working conditions, and, thus, must be handled under the Railway Labor Act's notice, negotiation and mediation provisions. Indeed, this is the way three appellate courts have concluded that similar transfers of work opportunities must be viewed. *Burlington Northern R.R. v. UTU*, 848 F.2d 856, 864 n.9 (8th Cir. 1988), *pet. for cert. pending*, No. 88-711;[3] *RLEA v. Pittsburgh & Lake Erie R.R.*,

[3] Respondents contend that the Eighth Circuit's decision is inapposite because the carrier's force-reduction agreements were not before the court. That argument is incorrect, for the court stated that an "alternative holding" for its decision that an injunction should not issue, was that the carrier "itself changed the status quo without serving a Section 6 notice and would thus be barred from seeking injunctive relief by its own omission." 848 F.2d at

supra, 845 F.2d at 428; *United Industrial Workers v. Board of Trustees*, 351 F.2d 183, 189-90 (5th Cir. 1965). The fact that respondent C&NW could transform the entire nature of this dispute, involving a clear change of working conditions into one that is subject to resolution by an adjustment board, simply by relying upon a claim that it has a right to abolish jobs once the work is actually transferred, shows that the lower courts and the rail industry need guidance from this Court as to the proper manner in which disputes involving changes in existing agreements will be classified.

Respectfully submitted,

WILLIAM G. MAHONEY
JOHN O'B. CLARKE, JR.*
HIGHSAW & MAHONEY, P.C.
Suite 210
1050 17th Street, N.W.
Washington, D.C. 20036
Attorneys for Petitioners Railway Labor Executives' Association, et al.

Date: November 17, 1988

* Counsel of Record

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864 n.9. In making that alternative holding, the court rejected the Burlington Northern's reliance on past practice involving the transfer of 2,700 miles of track and the abandonment of over 7,600 miles of line without bargaining, and the carrier's argument that:

> Under its existing agreements and past practices thereunder, [Burlington Northern] . . . has the unilateral right to abolish jobs resulting from the scaling back of its opertaions, subject only to proper notice to affected employees and certain other collective bargaining agreement requirements with which it complies.

(BN Supplemental Brief dated December 29, 1987 in 8th Cir. Nos. 88-2600 and 87-2581 at 7).

Supreme Court, U.S.
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No. 88-464

IN THE

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OCTOBER TERM, 1988

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
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v.

CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENTS' SUPPLEMENTAL BRIEF

CARL V. LYON
FRVR Corporation
1101 30th Street, N.W.
Washington, D.C. 20007
(202) 338-9022

STEPHEN M. OLSON
KIRKPATRICK & LOCKHART
1500 Oliver Building
Pittsburgh, Pennsylvania 15222
(412) 355-6500

JOHN M. NANNES
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
1440 New York Avenue
Washington, D.C. 20005
(202) 371-7000

Attorneys for Respondent FRVR Corporation

RALPH J. MOORE, JR.*
RICHARD M. WYNER
D. EUGENIA LANGAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

JAMES P. DALEY
STUART F. GASSNER
Chicago & North Western
Transportation Company
One North Western Center
Chicago, Illinois 60606
(312) 559-6100

Attorneys for Respondent Chicago & North Western Transportation Co.

* Counsel of Record

November 21, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-464

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENTS' SUPPLEMENTAL BRIEF

This supplemental brief is being filed to bring to the Court's attention the position of the United States on the question presented in this case, which we submit supports our contention that the petition presents no issue warranting review by this Court, either as a matter related to other pending line sale cases or on its own merits.

The Solicitor General has advised the Court that neither the United States nor the Interstate Commerce Commission will file briefs in response to the petition for certiorari in this case, because the court below, rather than addressing the Interstate Commerce Act questions involved in other pending line sale cases, resolved this

case on "a fully dispositive alternative ground."[1] Thus, the Solicitor General recognizes that the petition in this case is not, as RLEA has contended, "inextricably intertwined" (Pet. at 11) with the other line sale cases now pending before the Court.

In its Brief as Amicus Curiae in *Pittsburgh & Lake Erie R.R.* v. *RLEA*, Nos. 87-1589 and 87-1888 (filed Nov. 7, 1988), the United States did address the question presented here as to the proper standard by which courts are to determine whether a union claim that a carrier has taken action in violation of the Railway Labor Act's status quo requirements presents only an arbitrable minor dispute over the scope of the carrier's rights under existing agreements, but stated that this question is well settled:

> A question occasionally arises whether a collective bargaining agreement does or does not permit labor force reductions in certain circumstances. The resolution of that question, which turns on an interpretation of the agreement, is a "minor dispute" that is subject to mandatory arbitration by the National Railroad Adjustment Board (NRAB) or to its statutory alternatives. See 45 U.S.C. 153 ((First) (Second)). The court of appeals did not address that question [in *Pittsburgh & Lake Erie*] (87-1888 Pet. App. 16a-17a n.9). It is well settled (and not a matter of dispute in this case) that "if the subject matter of the parties' dispute is 'arguably comprehended' within, and potentially amenable to resolution by reference to, their existing collective bargaining agreements and the attendant established past practices" the matter falls within the exclusive jurisdiction of the NRAB.[2]

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[1] October 17, 1988 letter from Hon. Charles Fried, Solicitor General, to Hon. Joseph F. Spaniol, Clerk, United States Supreme Court, re this case, reproduced as the Appendix to this Supplemental Brief.

[2] Brief for the United States as Amicus Curiae, Nos. 87-1589 and 87-1888, at 15-16 n.12, quoting the court of appeals decision in this case (No. 88-464) as authority.

This analysis by the Solicitor General confirms that the issues presented by the petition in this case are well settled in their own right and do not warrant review.

Respectfully submitted,

CARL V. LYON
FRVR Corporation
1101 30th Street, N.W.
Washington, D.C. 20007
(202) 338-9022

STEPHEN M. OLSON
KIRKPATRICK & LOCKHART
1500 Oliver Building
Pittsburgh, Pennsylvania 15222
(412) 355-6500

JOHN M. NANNES
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
1440 New York Avenue
Washington, D.C. 20005
(202) 371-7000

Attorneys for Respondent FRVR Corporation

RALPH J. MOORE, JR.*
RICHARD M. WYNER
D. EUGENIA LANGAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

JAMES P. DALEY
STUART F. GASSNER
Chicago & North Western
Transportation Company
One North Western Center
Chicago, Illinois 60606
(312) 559-6100

Attorneys for Respondent Chicago & North Western Transportation Co.

* Counsel of Record

November 21, 1988

APPENDIX

[SEAL]

U.S. Department of Justice
Office of the Solicitor General
Washington, D.C. 20530
October 17, 1988

Honorable Joseph F. Spaniol, Jr.
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Railway Labor Executives' Ass'n v. Chicago & Western Transp. Co., No. 88-464

Dear Mr. Spaniol:

The petition for a writ of certiorari in the above case was filed on September 16, 1988, and was served on the government on that date. The Solicitor General and the Interstate Commerce Commission (ICC) do not intend to file a response to the petition unless requested to do so by the Court.

This case presents a dispute between a railroad and rail labor arising from the railroad's decision to sell a portion of its rail lines to another company. The ICC intervened in the district court proceeding to urge that rail labor's objection to the transaction amounted to an impermissible collateral attack upon the ICC's decision approving the sale pursuant to the interstate Commerce Act, 49 U.S.C. 10101 *et seq.* See Pet. App. 4a, 21a n.6. The court of appeals resolved the case, however, on a fully dispositive alternative ground (*ibid.*).

The ICC submits that since the petition for a writ of certiorari does not raise a question under the Interstate Commerce Act, the ICC has no occasion to file a response. The ICC continues to believe that this matter should have been resolved under the Interstate Commerce Act, but is of the view that the question of the proper relationship between that Act and the Railway

Labor Act is now sharply presented in other proceedings before this Court in which the ICC has filed or will file its statement of position. The Solicitor General, for his part, submits that the ICC is not a proper party respondent in this case because the ICC lacked statutory authority to intervene through its own counsel in the lower court proceedings. See Brief for the United States as Amicus Curiae in *ICC* v. *Pittsburgh & Lake Erie R.R.*, petition for cert. pending, No. 88-217. The Solicitor General and the ICC accordingly have agreed, albeit for different reasons, to abstain from filing a response in this case.

Sincerely,

CHARLES FRIED
Solicitor General

cc: William G. Mahoney, Esq.
John O'B. Clarke, Jr., Esq.
Highsaw & Mahoney, P.C.
1050 - 17th Street, N.W., Suite 210
Washington, D.C. 20036

Ralph J. Moore, Jr., Esq.
Shea & Gardner
1800 Massachusetts Avenue, NW, Suite 800
Washington, D.C. 20036

Stephen M. Olson, Esq.
Kirkpatrick & Lockhart
1500 Oliver Building
Pittsburgh, PA 15222

Susan Getzendanner, Esq.
Skadden, Arps, Slate, Meagher & Flom
333 West Wacker Drive
Chicago, Illinois 60606

Clyde Hart, Jr., Esq.
Interstate Commerce Commission
12th & Constitution Avenue, N.W.
Washington, D.C. 20423